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THE



LAW OF MORTGAGE

IN



LEGAL AND THE NORTH WEST PROVINCES.

BY

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OF THE INNER TEMPLE, BARRISTER AT LAW,
OF THE JUDGES OF HER MAJESTY'S HIGH COURT AT CALCUTTA.

SIXTH EDITION.

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ADVERTISEMENT TO THE SIXTH EDITION.

THE fifth edition of this Treatise being out of print, an entirely new edition has been prepared, incorporating the decisions of the Courts down to the commencement of the present year. The frame of the work remains virtually unchanged: but many very important additions and alterations have been rendered necessary by recent legislation and decisions.

The number of cases decided by the Privy Council which bear upon matters touched on in this book has increased greatly of late years,—as will appear on reference to the annexed table of Privy Council cases cited.

A. G. M.

Calcutta, May 24th, 1877.

ABBREVIATIONS.

- Moore.* Moore's Indian Appeal Cases.
L. R. I. A. (English) Law Reports, Indian Appeals.
B. L. R. Bengal Law Reports.
I. L. R. Indian Law Reports.
W. R. Sutherland's Weekly Reporter (Calcutta High Court,) 1864—1875.
W. R. sp. Sutherland's special volume of Reports of Cases [July 1862 to July 1864].
W. R. 1864. Sutherland's Reports of Cases decided in 1864 prior to commencement of Weekly Reporter.
Ind. Jur. Indian Jurist, New Series (1866 & 1867).
Hyde. Hyde's Calcutta High Court Reports (1862—1864).
Bourke. Bourke's Calcutta High Court Reports.
Marsh. Marshall's Calcutta High Court Reports (1862 and 1863).
Hay. Calcutta High Court Reports (1862 and 1863) published by G. C. Hay & Co.
Sel. Rep. Reports of Select Cases decided in the Calcutta Sudder Dewanny Adawlut from 1791 to 1848.
Rep. Sum. Cases. Reports of Summary Cases decided by the Calcutta Sudder Court.
S. D. A. Decisions of the Calcutta Sudder Dewanny Adawlut recorded in conformity with Act XII of 1843.
N. W. P. Ditto, North-Western Provinces.
Agra. Reports of Cases decided in the High Court of the North West Provinces, (1866—1868).
Agra F. B. Ditto, Full Bench Decisions.
All. Reports of cases decided by the High Court N. W. P. at Allahabad (1869—1871).
Mad. Madras High Court Reports (1862—1875).
Bom. Bombay High Court Reports.
Boulnois }
Fulton } Calcutta Supreme Court Reports.
Morton }
Tayl. & B. Tayler and Bell's ditto.

CORRIGENDA.

- P. 26, note (*m*) : for "Bhugwandoss" read "Bhugwandeem."
P. 30, note (*e*) : for "13" read "430."
P. 51, note (*e*) : for "6 Moore," read "8 Moore."
P. 78, note (*k*) : for "(not yet reported)" read "4 L. R. I.
A. 23."
P. 81, note (*r*) : for "Ramturun" and "Ramsurun."
P. 95, note (*f*) : before "N." insert "9."
P. 172, note (*j*) : for "12 Moore," read "13 Moore."
P. 192, l. 14 from top : for "Beg" read "Reza."

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INTRODUCTORY CHAPTER.

A MORTGAGE may be defined as a pledge, for securing a debt, of lands of which the debtor and those claiming under him remain either the actual owners, or in a position to assert their rights as actual owners, until debarred by judicial sentence or by legislative enactment. Mortgages of land have long been in use all over India, and are well known in Hindu and Mahomedan law.

The Mahomedan law made no distinction between mortgage of land and pledge of other property (a). Possession or seisin of the thing pledged, was in all cases the essence of the security: and hypothecation, the giving a lien over a thing without actual possession of it, seems to have been originally unknown. All that was required in order to give validity to the contract, was that possession should be once given so as to evidence the fact of the mortgage having been made. And a mortgage did not come to an end on the mortgagee's going out of possession, if he did not do so with the intention of relinquishing his security (b): nor was the right of a mortgagee who had obtained possession, injured by his being subsequently ousted by the mortgagor. Although possession was necessary in order to complete the mortgagee's title, it seems that he was not entitled to the use, or to the actual enjoyment of the profits of the property pledged, except by special agreement (c).

(a) Macnaghten's Mahomedan Law, p. 74.

(b) *Ibid.* p. 354.

(c) *Ibid.* p. 74.



INTRODUCTORY CHAPTER.

A mortgagee or pledgee in possession had priority over other creditors with respect to the property pledged, and was entitled to satisfy his debt thereout, before it could be applied to the liquidation of other claims : the surplus only which remained after discharging the mortgage debt being divisible among other creditors (*d*).

The taking of interest was forbidden among Mahomedans, but the property pledged was always presumed to be in value equivalent to the debt due ; and the mortgagee might in fact thus obtain, so long as he kept it in his own hands, what was of greater value than the sum lent (*e*).

The mortgagee could not, except with the consent of the mortgagor, at any time sell the property in pledge ; at least, if he sold it for more than the principal due upon the loan, he had to account to the mortgagor for what he received in excess of that sum (*f*).

The mortgagor could not dispose of the property mortgaged without the consent of the mortgagee. Such a sale was legally valid, but its operation depended entirely on the pleasure of the mortgagee, unless the purchaser paid off the mortgage debt, which he was entitled to do, or the mortgage was from some other source redeemed (*g*). But the consent of the mortgagee confirmed any such disposition, so that if the mortgagor sold to two persons in succession, and the mortgagee recognised the second sale only, that sale took priority over the first (*h*).

No partial payment of the mortgage debt affected the mortgagee's right over the whole property pledged : and the mortgage remained in force, not only until redemption, but until the mortgagee in consequence of the redemption actually gave possession of the property to the mortgagor (*i*).

(*d*) Macnaghten's Mahomedan Law, pp 75, 347.

(*e*) *Ibid.* p. 74.

(*f*) *Ibid.* p. 74.

(*g*) Macnaghten's Mahomedan Law, p. 176.

(*h*) *Ibid.* p. 355.

(*i*) *Ibid.* p. 356.



The Hindu law likewise recognised no distinction between mortgages of land and pledges of other property (*j*), and the pledge might be for a limited or for an unlimited time, and either usufructuary or for custody only. Actual possession was probably originally (*k*) essential to their validity, but there is little doubt that hypothecation has existed in the country from a remote period (*l*). When no date was specified for redemption, a mortgage might be redeemed at any distance of time, no title by prescription being acquired by the mortgagee in possession (*m*).

A mortgagee in possession had priority over all other mortgagees, if he obtained possession without force or fraud (*n*). The offence of one who, having mortgaged his property, afterwards fraudulently made a mortgage of it to another, was looked upon as a crime worthy of "whipping," "punishment for theft," "punishment as a robber," and even death (*o*).

Although these were the general principles which regulated mortgages amongst Hindus and Mahomedans, many changes and modifications appear to have been from time to time introduced; and there is much inconsistency in the various doctrines laid down in the books. In Hindu law there are numerous written texts in which possession is declared to be absolutely necessary in order to give validity to a contract of mortgage; as for example,—“By the acceptance or actual possession of a pledge, the validity of the contract is maintained” (*p*). “Pledges are declared to be of two sorts, immoveable and moveable, and both are valid when there is actual enjoyment, and not

(*j*) Colebrooke's Digest, v. 1, chap. 3, Tit. "Pledge," p. 140.

(*k*) *Ibid.* pp. 140—202.

(*l*) Strange's Hindu Law, v. 1, p. 288.

(*m*) Colebrooke's Digest, v. 1, p. 183: Strange's Hindu Law, v.

1, p. 290.

(*n*) Colebrooke's Digest, v. 1, p. 211.

(*o*) *Ibid.* pp. 209, 210.

(*p*) Colebrooke's Digest, v. 1, p. 161. Yajñawalkya.



otherwise" (q). On the other hand there are texts, although they are fewer in number and perhaps of less authority, some of them partially, others of them absolutely in opposition to these :—"Of him who does not enjoy a pledge, nor possess it, nor claim it on evidence, the written contract for that pledge is nugatory, like a bond when the debtor and witnesses have deceased" (r). "But if there be no occupancy, but a writing exist duly attested and so forth, the writing shall prevail, because it is the best evidence of a transaction: it shall establish the mortgage" (s). It is evident that the original doctrine had been considerably modified, and that, whatever may have been the case at first, a valid mortgage unaccompanied by possession, was a thing in later times not unknown in the Hindu law.

A strong argument in favor of the conclusion that possession is not demanded by either the Hindu or the Mahomedan law as we found them existing in this country, may be drawn from the fact that all the legislation of the English Government on the subject, has proceeded on the basis that mortgages are alike valid whether accompanied by possession or not. The earlier legislation of the East India Company did not profess to introduce new principles of law into the country, but rather to express and provide a better mode of enforcing those which already prevailed. The Regulations then enacted may therefore, so far as regards general principles, be presumed to be an embodiment of the law which was found prevailing: and as they in no degree recognise any necessity for the mortgagee's being put in possession, it may reasonably be inferred that according to the law of the land no such necessity existed, either among Hindus or Mahomedans.

One learned writer on Hindu law, adopting apparently a suggestion made by Sir William Jones, goes even so far

(q) Colebrooke's Dig. v. 1, p. 205.
Vayasa.

(s) Colebrooke's Dig. v. 1, p.
215. Helayudha.

(r) *Ibid.* p. 205. Vrihaspati.



as to think, that notwithstanding all that is said about the necessity of the delivery of possession in order to give validity to a mortgage, it is not unlikely that the mode of pledging without giving possession,—*i. e.* hypothecation,—originated among the Hindus (*t*).

The question as to the necessity for the delivery of possession (which the Regulations put beyond doubt in the Mofussil Courts) was on several occasions raised and discussed in the late Supreme Court under the Statute (*u*) which enacts that in hearing and determining actions or suits between Mahomedans or between Hindus, all matters of contract and dealing between party and party shall be determined, in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Hindus by the laws and usages of Hindus : and when only one of the parties shall be a Hindu or Mahomedan, by the laws and usages of the defendant. At one time it was held that a mortgage between Hindus was invalid, where there had been no possession (*v*). But these cases were overruled, and the Court always subsequently recognised the validity of, and gave full effect to Hindu mortgages, whether accompanied by possession or not (*w*).

The forms in which mortgage securities were given, seem to have been the same as those now in use : and the earlier Regulations shew that the usufructuary mortgage and the mortgage by conditional sale, were of common occurrence prior to their enactment.

The law which now governs mortgages in the Mofussil Courts, is to be found in the Regulations, and in the decisions of the Courts : and bare questions of Hindu or Mahom-

(*t*) Sir T. Strange, v. 1, p. 288.

(*u*) 21 Geo. 3, Chap. 70, Sec. 17.

(*v*) *Sibnarain Ghose v. Russick-chunder Neoghy*, Morton's Rep. 105.

(*w*) *Colly Doss Gungopadhy v. Sibchunder Mullick*, Morton's Rep. 111; *Sibchunder Ghose v. Russick*

Neoghy, Fulton's Rep. 36. And see as to the necessity for possession under the Hindu law,—*Raja Sahib Prahlad Sen v. Baboo Radhu Sing*, 12 Moore 275, 2. B. L. R. P. C. 111 : 14 B. L. R. 307 : 7 Bom. a. j. 4 : 8 Bom. a. j. 50, 55.



INTRODUCTORY CHAPTER.

edan law rarely if ever arise (*x*). The law on the subject all bears date since the year 1780, when the legislature seems first to have interfered in the matter indirectly by an Act limiting the amount of interest which the lender of money might legally receive. One form of mortgage, which before that time was much in vogue, was of a very simple nature. The lender received from the borrower a piece of land, receiving the profits in lieu of interest, and retaining possession until the loan was paid off by the mortgagor; the risk of loss in bad years was set off against the profits of good years; no question arose as to the precise sum received by the mortgagee, who was not bound to render any account: and the mortgagor was personally liable for the payment of the principal, but not for any thing further. The Regulation above referred to, however, and subsequent enactments (*y*), changed the character of such securities, and introduced a close system of accounting, applicable to all mortgages made before Act XXVIII of 1855 came into force. They declared that no more than 12 per cent. per annum should be allowed as interest on any mortgage; that all sums received by the mortgagee in excess of 12 per cent., should go to the account of principal; and that whenever he had received a sum amounting to the principal with legal interest, the mortgage should be considered as cancelled and redeemed. In legislating on the subject of mortgages, the Government has for the most part been guided by a desire to protect the debtor against his creditor, and, acting on this principle, does not sanction in any case the transfer of immoveable property in satisfaction of a debt, without the intervention of a public officer,—unless such transfer be by the direct and immediate act of the proprietor himself (*z*).

(*x*) S D. A. 1848, p. 530: 7. Reg. XVII. 1806, Sec. 6.
N. W. p. 88. (*z*) S. D. A. 1847, p. 354: 8 N.
(*y*) Reg. XV. 1793, Sec. 10: W. P. 447.
Reg. XXXIV. 1803, Sec. 9:



CHAPTER II.

OF THE VARIOUS KINDS OF MORTGAGES.

THERE are various kinds of mortgages now in common use throughout Bengal and the North West Provinces, each kind being attended with rights and liabilities peculiar to itself. In one, the regular payment of the interest of the money advanced is well secured to the mortgagee, while the principal is not recoverable at any fixed period, nor in one sum, but is only gradually to be liquidated from what is received from the land by the mortgagee, in excess of the interest he is entitled to, the mortgagor not being personally liable for the re-payment of either principal or interest. In another, the lien or charge which the mortgagee has on the property, gives him no security for the regular payment of interest, but the mortgagor is personally liable for that and for the principal, which are, after a certain time, recoverable in one sum, either from the mortgagor or from the mortgaged property, the latter being liable to be sold, and the proceeds of its sale being applicable in the first instance towards the liquidation of the mortgage debt. In a third, there is no security for the regular payment of interest, nor is the mortgagor personally liable for that or for the principal, but on default being made, the whole property passes away from the mortgagor, and vests absolutely in the mortgagee.

Whatever may be the form adopted, the mortgage is subject to the incidents attached by law to that form : and this, it would seem, notwithstanding any stipulations to the contrary, which the parties may have made between themselves (a).

(a) See 8 N. W. P. 161.

There are five different kinds of mortgages. Three of these are simple and pure forms, wholly distinct from each other in their nature and properties (*b*). The others are merely combinations of the simple forms, and are governed by the rules laid down as to these forms, according as the particular matter in question belongs rather to one form than to another.

The three pure forms are (*c*),—*the usufructuary mortgage*,—*the simple mortgage*,—*the mortgage by conditional sale*, *kutkubala*, or *bye-bil-wufa*.

I. *The usufructuary mortgage* :—Where a man borrows money and gives up his land to the lender, who (unless his debt is paid off by the mortgagor) may retain possession until he has, from the rents and profits of the land, repaid himself the interest, or, according as the terms of the agreement in each case may be, the principal and interest of the sum advanced by him. Mortgages of this kind correspond with the original *vivum vadium* or the Welsh mortgage known in English law,—where there is no contract express or implied between the parties for the repayment of the money, and the mortgagee cannot foreclose or sue for the money though the mortgagor or his representatives may redeem at any time; the possession of the mortgagee being of the very essence of such a mortgage (*d*).

Of usufructuary mortgages there are two sorts in common use, namely, mortgages of the whole right and estate of the mortgagor, and mortgages of his right and estate for a term of years only, that is to say by way of lease.

Zur-i-peshgee leases, or leases granted on a sum of money being advanced, are on the same footing as pure usufructuary mortgages, and are dealt with as such; but this is

(*b*) S. D. A. 1847, p. 354. See 8 N. W. P. 447.

(*c*) S. D. A. 1847, p. 354.

(*d*) Coote on Mortgages, 3d. Ed. p. 4: and see Fisher on Mortgages, 3d. Ed. pp. 5, 11. A “*bhog*”

bundhuk” is a mortgage with possession, in which the thing pledged is considered an equivalent for interest. N. W. P. 1855, p. 341: 15 W. R. 332. See 3 Mad. 366.



only when there is a power of redemption reserved to the lessor either expressly or impliedly, so that it distinctly appears that the parties themselves in fact intended the transaction to be in the nature of a mortgage (*e*). Thus a lease at a yearly rent of 214 rupees, from which a deduction of 111 rupees was to be made on account of interest, and in which it was stipulated that "if on the expiration of the lease, the loan should not be repaid, the lease should continue," was held to be a *zur-i-peshgee* lease to be dealt with as a mortgage (*f*).

When a mortgage is given by way of lease, the loan is generally made re-payable on the same day that the lease expires, the deed containing a stipulation that if default is made, the lender and lessee shall continue in possession on the terms of the lease, until the debt is repaid from the profits of the land or otherwise.

If by the terms of the contract, the mortgagee is to look to the usufruct of the land for the payment of both principal and interest, the mortgagor is not personally liable for the payment of either, in the absence of a special agreement that he shall be so. And it would seem to have been held that even where the application of the profits was expressly limited to the liquidation of interest, the mortgagor was not personally liable for the principal. There is little doubt, however, but that in this last case the mortgagor is liable for the principal, especially if the contract was made subsequent to the passing of Act XXVIII of 1855 (*g*).

The mortgagor has the right of redemption on liquidation of the debt, either from the usufruct, or by a cash payment or deposit in Court (*h*).

Before Act XIV of 1859 came into operation the usufruct-

(*e*) S. D. A. 1855, p. 481: N. 8 Mad. 31.
W. P. v. S. p. 356: v. 10. p. 355. (*g*) 3 N. W. P. 211: 1 Sol. Rep.
See S. D. A. 1857, p. 1232: *et* 121.
passim. (*h*) S. D. A. 1847, p. 354. See
(*f*) 2 Hay, 159. So 3 Mad. 363: *post* Ch. VIII.



uary mortgagee never could become absolute owner of the mortgaged estate, and the right of redemption remained to the mortgagor and his representatives after any lapse of time, however great. But by section 1, clause 15 of that Act, the period of limitation to suits against a mortgagee of immoveable property, for recovery of the same, was declared to be sixty years. The provisions of Act XIV of 1859 are in substance similar to those of the present law, Act IX of 1871, Sch. 2, Art. 148, under which such a suit is barred unless brought within sixty years from the date of the mortgage save where an acknowledgement of the title of the mortgagor or of his right of redemption has before the expiration of the prescribed period (of sixty years) been made in writing signed by the mortgagee or some person claiming under him,—and in such case, within sixty years from the date of the acknowledgement.

II. *The simple mortgage* :—Where the borrower binding himself personally for the re-payment of a loan with interest, pledges his land as a collateral security for such re-payment.

He does not give up possession of the property to the mortgagee, or permit him to enjoy the usufruct of it, nor does he covenant to make an absolute transfer of it in the event of non-payment. On default, the mortgaged estate does not at once pass into the hands of the mortgagee, nor does it of necessity do so at all. The mortgagee enforces his security by suing the mortgagor for what is due as principal and interest, and for a declaration that he has a lien or charge on the land for the debt, and that he has a right to enforce it by sale of the property. Having obtained a decree, he proceeds in execution to sell the land, and out of the proceeds of the sale to satisfy his claim, the mortgagor being entitled to any surplus which may remain. The mortgagee may himself be the purchaser if he chooses (i). From the date on which the money advanced is in the agreement declared to be repayable, up

(i) 6 N. W. P. 218.





to the time of decree and sale, the mortgagor has the right of redeeming on payment of the balance due in respect of principal and interest: that right, however, necessarily becomes extinct on a sale taking place.

The mortgagor in the case of simple mortgages, is liable to lose his land, but it does not thereupon vest in the mortgagee.

III. *The mortgage by conditional sale, kut-kubala, or bye-bil-wufa*, is that in which the borrower, not making himself personally liable for re-payment of the loan (*j*), covenants that on default of payment of principal and interest on a certain date, the land pledged shall pass to the mortgagee.

If the debt is not paid as stipulated, the mortgagee can have the property transferred absolutely to him. For this purpose he must (wherever Regulation XVII of 1806 is in force) proceed to foreclose according to certain prescribed rules, converting the conditional sale into an absolute one, and obtaining possession. Until he takes such proceedings, the mortgagor remains in possession and enjoyment of the property, and has the right of redemption on paying off what is due on the mortgage; but on foreclosure, that right ceases, and the property passes wholly from the mortgagor and vests in the mortgagee.

In mortgages by conditional sale, the mortgagor is liable to lose his estate, and when he does so, it passes at once to the mortgagee.

A conditional sale has now an operation different from what such transactions originally had. It is now, under the Regulations, to be regarded as a mortgage redeemable at any time by the mortgagor or those claiming under him in privity with his title as mortgagor (*k*). Apart from legislation, the essential characteristic of a mortgage by conditional sale was that on breach of the condition, the

(*j*) 7 Sel. Rep. 92.

rutton Roy, 7 Moore 323, 4 W. R.

(*k*) *Prannath Chowdry v. Ram-* P. C. 376.



contract executed itself and the transaction was closed and became one of absolute sale without any further act of the parties or accountability between them. This was the character of such transactions before Regulation XVII of 1806 came into force. And this is their nature now in those parts of India (*e. g.* the Presidencies of Madras and Bombay) in which that Regulation has never been in force (*l*). What is known in English law as "the equity of redemption" depends on the doctrines established by Courts of Equity, that the time stipulated in the mortgage deed is not of the essence of the contract. Such a doctrine is unknown to the ancient law of India, and exists in India now only by special legislation (*m*).

Combinations of these three pure forms give rise to two other kinds of mortgage, the one being the simple mortgage usufructuary, and the other the conditional mortgage usufructuary.

IV. *The simple mortgage usufructuary* is that in which, though the property is only collaterally pledged, as in the case of a pure simple mortgage, the mortgagee is permitted to have the usufruct of it. This may be done either by simply allowing him to receive the rents and profits, or by giving him a lease for a limited period. In either case, the proceeds are credited to the mortgagor against interest, and, if they exceed what the mortgagee is entitled to for interest, against principal also. As in a pure simple mortgage, the mortgagor is personally liable, and his estate subject to be sold on default, though redeemable until it is so sold.

V. *The bye-bit-wufa or kut-kubala usufructuary*:—Where the mortgagee by conditional sale has the usufruct of the property, either by being merely put in possession and allowed to receive the rents and profits, or by having a lease given to him by the mortgagor. The position of the parties up to the date on which the loan is re-payable,

(*l*) *Thumbasawmy's case*, 2 L. R. I. A. 248. See 5 W. R. 88.

(*m*) *Lattabhiramier's case*, 13 Moore 560 (572), 7 B. L. R. 136.



is in all respects the same as in a pure usufructuary mortgage. From that date their position resembles what it would be in a pure conditional mortgage. But the mortgagee is in the receipt of the profits of the land. Until he has obtained a decree for foreclosure, he must account for such receipts, unless his mortgage was made after the passing of Act XXVIII of 1855 and the agreement is that the usufruct should be taken in lieu of interest. The mortgage is redeemed or cancelled whenever, prior to his obtaining a decree for foreclosure, the mortgagee has received a sum equal to the principal with interest at a rate not higher than 12 per cent. per annum, or (if the contract was entered into subsequent to the passing of Act XXVIII of 1855) whenever he has received the principal with interest at the stipulated rate, or at such rate as the Court shall think proper if there be no stipulation on the subject.

CHAPTER III.

OF PERSONS CAPABLE OF MORTGAGING.

EVERY person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject (a). The right to mortgage is *primâ facie* incident to the right of property, and co-extensive with it; but to this rule there are exceptions in the cases of minors and persons of unsound mind. And those whose rights are of a limited or qualified nature, cannot do any valid act in excess of these rights. Thus a Hindu widow, holding property belonging to her husband's estate which devolved to her by succession, upon his death, cannot, except under certain circumstances, make a mortgage which will be valid against the heirs in reversion of the husband. And if the estate is ancestral property belonging to a Hindu family in which the doctrines of the Mithila school or the Mitakshara prevail, and has been mortgaged without the consent of all those interested in it, or if the land is *mal-i-wuqf* or *dewuttur*, devoted to religious purposes, a mortgage of it may generally be set aside.

A person is said to be of sound mind for the purpose of making a contract, if at the time when he makes it he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. One who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind,—but he cannot make a contract when he is of unsound mind (b).

(a) The Indian Contract Act, IX of 1872, Sec. 11. (b) Act IX of 1872, Sec. 12.



If a person is adjudged under Act XXXV of 1858 (which deals with the estates of lunatics who are not subject to the ordinary original jurisdiction of the High Courts) to be of unsound mind and incapable of managing his affairs, and if a manager of his estate is appointed (*c*)—such manager has not power to sell or mortgage the estate, or to grant a lease of any immoveable property for a period exceeding five years, without an order of the Civil Court by which the manager was appointed, previously obtained (*d*). It is in truth wholly unsafe to lend money to a person of unsound mind or his *de facto* guardian or manager, on the security of a mortgage of the lunatic's property, unless the guardian is also *de jure* guardian and has been appointed under the Act, and unless the mortgage is sanctioned by the Court. It has been held that all dealings with the property of a lunatic, to be binding, must be effected by a guardian or manager duly appointed under Act XXXV of 1858, and that a *de facto* manager can have no greater powers than one duly appointed. And when the mother of a person of unsound mind, who had not been appointed manager under the Act, mortgaged his estate without the previous sanction of any Court, the mortgagee's suit for foreclosure was dismissed (*e*).

In cases in which proceedings in Lunacy have been taken under Act XXXIV of 1858 in the High Court on its Original side, the person placed in charge of the lunatic's estate is called the Committee. The Court may (*f*), if it appears to be just or for the lunatic's benefit, order that any property moveable or immoveable of the lunatic be sold or charged by way of mortgage as may seem most expedient. The purposes for which money may be so raised are,—the payment of the lunatic's debts, including any debt incurred for his maintenance or otherwise for his benefit; the discharge of any incumbrance on his estate; provision for his future maintenance; and the payment of the costs

(*c*) Act XXXV of 1858, Sec. 9.

(*d*) *Ib.* Sec. 14.

(*e*) 10 B. L. R. 364.

(*f*) Sec. 18.

of any inquiry under the Act &c. Section 19 directs that the Committee of the lunatic's estate shall, in the name and on behalf of the lunatic, execute all such conveyances and instruments of transfer relative to any sale, mortgage, or other disposition of his estate as the Court shall order. And Section 20 provides that when a person having contracted to mortgage his estate, afterwards becomes lunatic, the Court may, if the contract is one which it thinks ought to be performed, direct the Committee of the estate to execute the necessary conveyance and fulfil the contract. If the lunatic is possessed of land situated beyond the local limits of the ordinary original jurisdiction of the High Court, which by the law in force for the time being subjects the proprietor if disqualified to the superintendence of the Court of Wards, the Court of Wards may assume charge of the land and manage it: but this does not affect the provisions as to the necessity of obtaining the High Court's order sanctioning any proposed mortgage (g).

The property of "disqualified proprietors" whose estates are under the charge of the Court of Wards cannot be legally mortgaged or otherwise dealt with save under the provisions of the special Acts which regulate the powers and proceedings of the Court of Wards. Under the Act in force in Lower Bengal, Act IV of 1870 of the Bengal Council, (h) all "proprietors of entire estates" who are not subject to the "jurisdiction as respects infants and lunatics of a High Court," who are, females not deemed by the Court competent to the management of their own estates, or minors, or persons for the time being of unsound mind or otherwise incapable of managing their affairs by reason of any disqualifying natural or acquired defect,—are subject to the superintendence and jurisdiction of the Court of Wards, and the Court may take charge of the estates of such disqualified proprietors. Any mortgage or sale of land belonging to a disqualified proprietor who has been made

(g) Act XXXIV of 1858, sec. 24.

(h) Sec. 2.



a ward, must be by "the Court in charge of the ward" and "with the assent of the Board of Revenue" (i). The Court may sell or mortgage for the purpose of liquidating any just debts due in respect of the property of the ward and for certain other objects specified: and for the purpose of any such sale or mortgage any conveyance executed by the Collector in charge of the ward, under the order of the Court, shall be valid to pass the estate of the ward and of every one whom the ward if not disqualified could have bound by a conveyance made for the payment of the debts of the ancestor from whom the property descended.

The law in force in the North Western Provinces is Act XIX of 1873,—and though in the main the same as the Bengal Act, it differs in some respects from it as regards both the definition of "disqualified proprietors," and the provisions as to mortgaging or selling their property.

Under this Act, all proprietors of mahals or parts of mahals shall be held disqualified to manage their own lands when they are,—females deemed by the local Government incompetent to manage their estates; minors; idiots; lunatics; persons otherwise rendered incapable by physical defects or infirmities from managing their own estates; persons convicted of a non-bailable offence and disqualified in the opinion of the Local Government by vice or bad character, from managing their estates; or persons declared by the Local Government on their own application to be disqualified from managing their estates (j).

With reference to selling or mortgaging the property of a ward, Act XIX of 1873 (k) provides that the Court of Wards shall have power to give such leases or farms of the property under its charge, and to mortgage or sell any part of such property, and to do all such other acts as it may judge to be most for the benefit of the property and the advantage of the ward. And the Court of Wards

(i) Act IX of 1870 (B. C.) Sec. 68. (j) Act XIX of 1873, sec. 191.

(k) *Ib.* sec. 203.

may exercise all its powers through the Collectors of the districts in which any part of the property of the wards may be situated, or through any other person whom it may appoint for such purpose (*l*).

Wherever the property may be situated, it is evident that any one lending money on the mortgage of property under the charge of the Court of Wards, must take care that the mortgage is made in strict accordance with the law.

Minors (not under the Court of Wards) are incapable of executing a mortgage of their property so as to bind themselves (*m*). But a mortgage by a minor's legal guardian is valid and will be sustained, if made *bond fide* and for the benefit of the minor and of his property (*n*). A guardian who mortgages his ward's property, ought to do so in his character of guardian, and not as if he were himself proprietor (*o*).

The leading case on this subject is that of *Hunoomanpersad Panday*, in the Privy Council. A Rancee, the guardian of, or manager for her minor son, mortgaged ancestral lands which had on his father's death descended to the son as heir. In the mortgage deed she was described not as guardian or manager but as being herself absolute proprietor, and the deed was in consequence set aside by the Agra Court (*p*). But on appeal to the Privy Council this decision was reversed (*q*). Their Lordships remark, with reference to the point of the mother having described herself as proprietor instead of a guardian or manager, that the Lower Court

(*l*) Act XIX of 1873 sec. 204.

(*m*) As to what is the age of majority, see Act IX of 1875: Act XL of 1858: 1 I. L. R. 108 (F. B.): 10 B. L. R. 231 (F. B.): 1 B. L. R. F. B. 49: *Jumoon Dassya v. Bamasonduri Dassya*, 3 L. R. I. A. 72, 1 I. L. R. 289.

(*n*) 4 Sel. Rep. 339: 5 Sel. Rep.

82; S. D. A. 1846, p. 371: 1856 p. 980; 6 N. W. P. 234. See S. D. A. 1856, p. 392.

(*o*) S. D. A. 1848, p. 791: 8 N. W. P. 156.

(*p*) 7 N. W. P. 21.

(*q*) 6 Moore 393.



“did not enter upon the question of the validity of the charge in whole or in part, as a charge effected by a *de facto* manager or proprietor whether by rightful or wrongful title, nor advert to the fact that the charge included some items of former charge wholly unaffected by the objection which they considered of such weight.” And after some further observations they continue, “it is not suggested that she ever claimed any beneficial interest in the estate as proprietor: had she done so, it would have been *pro tanto* a claim adverse to her son: and it is conceded that she did not claim adversely to her son. The terms ‘proprietor’ and ‘heir’ when they occur, whether in deeds or pleadings or documentary proofs, may indeed by a mere adherence to the title be construed to raise the conclusion of an assumption of ownership in the sense of beneficial enjoyment derogatory to the rights of the heir: but they ought not to be so construed, unless they were so intended, and in this case their Lordships are satisfied that they were not so intended. They consider that the acts of the Ranee cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself, or others gave to her, and that she must be viewed as a manager inaccurately and erroneously described as ‘proprietor’ or ‘heir:’ and it is to be observed that the Collector takes this view, for whilst he remarks on the improper description of her as heir, or proprietor, he continues her name as ‘Surberakar.’ If the whole context of all these documents and pleadings be taken into consideration, and the construction proceed on every part, and not on portions of them, they are sufficient in their Lordships’ judgment to show the real character of her proprietorship.”

On the general question of the power of a minor’s guardian or manager to mortgage the minor’s estate, and of the degree to which the *onus* is thrown on the mortgagee of proving that the charge was created for the benefit of the

minor and from necessity,—their Lordships thus lay down the law: “The power of the manager for an infant heir to charge an estate not his own, is under the Hindu law a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make, in order to benefit the estate, the *bond fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But of course if that danger arises, or has arisen, from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a necessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *malâ fide*, will not be affected though it be shown that with better management the estate might have been kept free from all debt. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that therefore the mere creation of a charge securing a proper debt cannot be viewed as improvident management. The purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he



enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bond fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived" (r).

The question as to the existence of a necessity must be decided upon the evidence in each case as it arises. It has been held that, as the performance of the father's *shrad* is incumbent on the son,—where there are no other funds available for the purpose, money may properly be lent to the son, though a minor, in order to enable him to perform his father's *shrad* suitably (s).

A minor is not bound by a contract entered into by his guardian who borrowed money merely to enable him to assert a right of pre-emption to certain property and to complete a contract which he had unnecessarily made to purchase certain other property (t).

Due care and attention must be used by a mortgagee or purchaser dealing with a minor or his guardian: and the mere absence of any fraudulent intention is not sufficient. The *bona fides* of the mortgagee or purchaser is a matter which must be determined in each case. A sale by a guardian having been set aside on the ground that the sale was not warranted by law, as made without necessity, the purchaser appealed to the High Court urging that he acted *bond fide*, and that there was no express finding of the Lower Court that he acted otherwise. But the appeal was dismissed, the Court observing,—“We think the finding of the Lower Court, although it does not amount to a finding of fraud or collusion on the part of the purchaser, is substantially a declaration that he did

(r) See W. R. 1864 p. 166: 6 W. R. 36, 262: 7 W. R. 23: 8 W. R. 364: 9 W. R. 297.

(s) 6 W. R. 34. As to what amounts to “necessity,”—see *post*

as to alienations by members of a joint Hindu family and by a childless Hindu Widow.

(t) 20 W. R. 372. See 20 W. R. 38.



not act *bond fide*, that is to say, that if in fact he believed that there was a legal necessity for the sale which the guardian was making, he had not exercised due care and attention in arriving at that belief. * * * * It seems clear that the purchaser cannot have made any real attempt to satisfy himself as to the necessity for the sale. He is therefore not a purchaser who is protected by the ruling of the Privy Council in the case of *Hunoomanpersad Panday*" (u).

When a person after attaining majority, questions a sale of his property made by his guardian during his minority, the *onus* lies on him who upholds the purchase, not only to show that under the circumstances of the case the guardian had the power to sell, or that the purchaser reasonably supposed he had the power, but further to show that the whole transaction so far as regarded the purchaser was *bond fide* (v).

And a minor is not concluded by his guardian's assent to a *butwara*, unless it is proved that the guardian acted *bond fide* and with due regard to the interests of the minor (w).

But where a guardian had joined (on behalf of the minor) in a compromise which the Court approved by a decree, it was held by the Privy Council, on an attempt made by the minor fifteen years afterwards to dispute the compromise, that the *onus* lay wholly on him. Their Lordships said: "It is undoubtedly the duty of guardians scrupulously to regard the interests of minors in dealing with their estates; and the Court will when necessary enforce the performance of this duty. But the interests of infants would seriously suffer if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate, whether well or ill founded: and such a notion might prevail, if the com-

(u) 5 W. R. 103: 23 W. R. 424 6 W. R. 262: 21 W. R. 287.

See 2 Agra, 147.

(w) 17 W. R. 217. See 17 W.

(v) 9 W. R. 297: 9 W. R. 571: R. 239: 22 W. R. 119.



promise of a claim of debt confirmed by a decree of a Court were to be set aside after sixteen years without distinct proof of fraud" (x).

The holder of a certificate of administration under Act XL of 1858 has the same powers as regards the management of the minor's estate as might have been exercised by the proprietor himself if not a minor. But such a certificate gives no power to sell or mortgage any immoveable property, or to grant a lease, for any period exceeding five years, without an order of the Civil Court previously obtained (y). However, notwithstanding the absence of any such order, a minor's suit to recover possession was dismissed in a case in which it was proved that the mortgage made by the guardian was in fact a proper one, and there had subsequently been a decree in a suit in which the minor was represented, under which decree the property had been sold (z).

A mortgage made by a guardian is in all cases valid, if ratified by the minor after attaining his full age (a). But if the minor immediately upon his attaining his full age sells an estate previously mortgaged by his guardian, no subsequent ratification by the minor of the guardian's act will be of any avail (b).

Mere delay on the part of one who has recently attained majority, in repudiating an act of his guardian, can not be treated as ratification of the act, and is no bar to a suit to set it aside,—so long as the delay falls short of the period prescribed by the Limitation Act IX of 1871 (c).

Without such ratification, money advanced to a guardian for what the Court does not consider to be for the minor's benefit, as, for example, money advanced to carry

(x) *Baboo Lekraj Roy v. Baboo Mahtab Chand*, 14 Moore 393, 10 B. L. R. 35.

(y) Act XL of 1858, Sec. 18. 15 B. L. R. 350, 24 W. R. 46.

(z) 22 W. R. 77.

(a) S. D. A. 1853, pp. 494, 525.

(b) S. D. A. 1853, p. 312.

(c) Sec. 7. Sec 10 B. L. R. 324.



on excessive litigation, will be considered as having been obtained by the guardian on his own personal responsibility (*d*).

But if the money received by the guardian was really applied to the minor's benefit, the latter before he can recover possession must refund to the mortgagee or purchaser, the money received and applied to his advantage with interest (*e*). And when the minor had, shortly before reaching majority, assented to the sale by the guardian, the Court declined (in a suit brought by him when of full age) to set the sale aside except on the terms of his refunding the amount actually received (*f*).

One who purchases land from a minor is not, merely by virtue of his purchase, entitled to sue to set aside a mortgage previously made by the minor. Such a mortgage is to be deemed valid until avoided by some distinct act of the minor on his attaining majority (*g*).

The principles applicable to alienations of the property of a ward by his guardian or manager are also generally applicable to alienations by an executor or manager appointed by the will of a Hindu not coming under the Hindu Wills Act, or of a Mahomedan.

The Hindu executor of a deceased Mahomedan borrowed money to pay off a debt for which certain property belonging to the testator's estate was about to be sold. As security for the money so borrowed, he gave a mortgage of certain property belonging to the estate. The mortgagee having sued on his mortgage bond, the parties beneficially interested disputed the mortgage on the ground that the loan was not *necessary* or contracted in order to save the estate, inasmuch as at the time it was made, a large amount of money was in the hands of the executor. It was held, on appeal to the High Court (*h*), that even if the executor had funds in hand with which he might have paid off the

(*d*) S. D. A. 1853, p. 531.

(*e*) 21 W. R. 287.

(*f*) 7 B. L. R. 90, 15 W. R. 268.

(*g*) 3 B. L. R. a. j. 426, 12 W.

R. 378.

(*h*) W. R. 1864, p. 99.



original debt without borrowing from the plaintiff, that fact would not invalidate the plaintiff's claim against the estate, unless there were good reason to infer that he knew of these funds, or might have known of them if he had exercised ordinary diligence on the point.

In another case, a mortgage granted by the executor of a Hindu was set aside and declared null and void as against the heirs (i). The executor, Doorgapersad, in borrowing the money and granting the mortgage, acted contrary to the provisions of the will of the testator: and the mortgagees in lending the money, made no sufficient inquiries as to the circumstances under which the executor was contracting the loan. The Court said,—“Under the will, Doorgapersad had no right to create this mortgage. Although Doorgapersad became the ‘attorney’ or executor under the will of Rajmohun (the testator) he had not, according to Hindu law, the same power over the estate of Rajmohun, moveable and immoveable, which an executor would have over leasehold estate according to English law. We think that according to Hindu law, an *attorney* or executor under a will, has no greater power over immoveable estate than a manager,—which, according to the decision of the Privy Council in the case of *Hunoomanpersad Panday*, is a limited and qualified power. And further, we are of opinion that the general power of a manager under a will may be restricted by the will, and that the manager is bound to act according to the directions in the will. If, therefore, Doorgapersad had the power to mortgage for specific purposes, it would have been the duty of the lender to inquire into the circumstances under which the estate was about to be mortgaged, and whether the executor had authority under the will to effect such a mortgage” (j).

An executor, however, who has obtained probate, or an administrator who has got letters of administration with

(i) 3 W. R. 7 (Misc.) note, and Bourke, 48 (Ap.).

(46): and *Chetty Culum Comora & Co.* 8 Moore 319 (323).

(j) And see also 14 B. L. R. 21



the will annexed, under the Hindu Wills Act (XXI of 1870), has much larger powers than the executor of the will of a Hindu who does not come under that Act. He has in fact the same powers as an ordinary executor or administrator with the will annexed under the Indian Succession Act X of 1865. But nothing in the Hindu Wills Act authorises a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance,—or vests in the executor or the administrator with the will annexed of a deceased person, any property which such person could not have alienated *inter vivos* (k).

There is some doubt whether, as under the Act the estate of the testator wholly vests in an executor, it is not necessary that a transfer of it by him to the beneficiaries should be by registered deed. The assent of the executor to a specific bequest is sufficient to divest his interest as executor therein and to transfer the subject of the bequest to the legatee: but there is no provision that the mere assent of the executor shall divest his interest as executor in the estate, in favor of residuary legatees and devisees (l).

According to the Mitakshara and Mithila law (m) the alienation of joint undivided property is invalid, without the assent of all the sharers,—unless made under such necessity or other special circumstances as make it binding on all the sharers. Thus a mortgage of joint property by three sharers one of whom was a minor, was held bad as against the two adult proprietors as well as against the minor (n). So also, a mortgage of joint property by the

(k) Act XXI of 1870, sec. 3.

(l) Indian Succession Act X of 1865, secs. 292, 293.

(m) The Mithila law is very similar to the law of the Mitakshara—(see *Girdharee Lall v. Kantoo Lall*, 1 E. R. I. A. 320, 14 B. L. R. 194) and for the purposes of

this treatise, they are dealt with as being substantially the same. See also *Bhugwandoss Doobey v. Myna Bae*, 11 Moore 507.

(n) S. D. A. 1853, p. 334. See S. D. A. 1847, p. 557: 4 Sel. Rep. 158.



kurta (an elder brother) during the minority of a brother, or without the consent of those brothers who were of age (*o*) : and by a father of a joint Hindu family during the minority of his sons, or without their consent if of full age (*p*).

Under the head of alienations which are good because made from necessity may be ranked those made for the support of the family, for the services of religion (*q*), for the payment of Government revenue, or for any 'pressing need.' Where decrees obtained by creditors were in execution against the father of a family, and the ancestral property had been advertised for sale in satisfaction of these decrees, and the father had been fined and was in jail under a criminal prosecution : it was considered that the necessity of the case justified an alienation of part of the property, in order to raise money to pay the fine imposed on the father, and to save the remainder of the estate from sale (*r*). But only so much of the property should be sold as is sufficient to meet the claim : and if a larger portion is sold, it must be shewn by the purchaser that the money required to pay off the claim could not be raised otherwise (*s*). This last rule, however, does not apply to cases in which the excess is comparatively small (*t*). Thus in one case the Privy Council said that it was not because there was a small portion which was not accounted for, that the son had a right to turn out the *bonâ fide* purchaser who gave value for the estate (*u*).

In a case in which the ostensible purpose of the loan was to pay off Government Revenue, the Court ruled that in order to render such a loan binding upon those who had

(*o*) Fulton's Rep. 368, note *a*. W. P. 414.

See 5 W. R. 221 : 7 W. R. 298, 502.

(*p*) 6 Sel. Rep. 71. See S. D. A. 1853, p. 344.

(*q*) See 5 Sel. Rep. 24.

(*r*) 5 N. W. P. 327. See 6 N.

(*s*) S. D. A. 1861, v. 1, p. 193.

(*t*) 8 W. R. 75. See 9 W. R. 108.

(*u*) *Girdharree Lall v. Kantoo Lall*
1 L. R. I. A. 332, 14 B. L. R. 197.



reversionary interests in the property, it must be satisfactorily proved that the loan was at the time absolutely necessary from failure of the resources of the estate itself, and was not raised through the caprice or extravagance of the proprietor (v). Latterly, however, the general principles laid down in the case of *Hunoomanpersad Panday* (w) have usually been acted on and it has been held that where the debt has been contracted really under circumstances of pressure and for the benefit of the estate, the lender's title is good and is not affected by the waste or mismanagement of the borrower (x).

Many important cases bearing on this subject have been decided within the last few years. The matter has been much discussed : but there still are various points on which the law can scarcely be said to be finally settled.

According to the true notion of an undivided Hindu family, no individual member of a family whilst it remains undivided, can predicate of the joint and undivided property that he, any particular member, has a certain definite share. No individual member of an undivided family could go to the place of receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and there dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with : and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the

(v) S. D. A. 1858, p. 802.

(w) 6 Moore 393.

(x) S. D. A. 1859, p. 1643, and
see p. 376 : 3 W. R. 122.



property itself has not been actually severed and divided (y).

So long as a Hindu family under the law of the Mitakshara is living in the joint enjoyment of the family property, without having come to an actual partition among themselves of that property, or an ascertainment and partition of their rights in it, so long no member of the family has any such separate proprietary right in the property as he can alienate or encumber. Under such circumstances, the property belongs to all the members of the family jointly, and no one of the individual members has any share in it which he can deal with as his own : and it can be mortgaged or sold only by the joint act of all the members, or by the *kurta* or manager of the family in the event of there being such a case of family necessity as will in the eye of the law invest the *kurta* with authority to alienate as the agent of all. A son acquires by birth a right in ancestral property and can during his father's life compel a partition of such property : the father can not alienate the property except for certain beneficial purposes, and the son may sue to set aside alienations improperly made (z).

But ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. Unless the debt is of such a nature that the son is under no obligation to pay it, the discharge of it even though it affected ancestral estate, would still be an act of pious duty in the son. The freedom of the son from the obligation to discharge the father's debt, has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt. It being a pious duty on the part of the son to pay his father's debts, the ancestral property, in which the son, as the son of his father, acquires

(y) See *Appovier's case*, 11 Moore R. 15 (F. B.) : 9 W. R. 511 (F. B.), 75 (89). 12 B. L. R. 90, 100. See 12 B. L.

(z) 3 B. L. R. F. B. 31 : 8 W. R. 373.

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an interest by birth, is liable to the father's debts (a). Apparently the interest which a son under the Mitakshara law acquires by birth, in the ancestral property of his father, remains liable to the payment of the personal debts of the father even though subsequently contracted, in the same way as the entire property would have been liable had the son not been born,—except only in the case where those debts are illegal, or were contracted for an immoral purpose. And any disposition of the property which is reasonably made by the father for the purpose of discharging a debt of the father's which does not fall within the exception is one of those spoken of and authorised as “unavoidable” in the Mitakshara (b). If the debt is of such a nature that the property is ultimately liable to discharge it, the alienation of that property whether by mortgage or sale by the father upon reasonable terms for the purpose of discharging the debt, must be substantially an “unavoidable” transaction (c).

According to the Mitakshara, a son cannot prevent his father from alienating property which the latter has inherited collaterally. The restriction upon the father's power applies only to property which has come from the grandfather (father's father) (d). And under the law which prevails in the Mithila country,—probably also under the Mitakshara,—the father may at his pleasure alienate or dispose of self-acquired property (e).

Although it may not be necessary for the mortgagee or purchaser to see to the application of the money paid by him, still it is necessary for him to make due inquiry as to the necessity to borrow or sell (f).

When ancestral joint property is put up for sale in exe-

(a) *Girdharee Lall v. Kantoo Lall*
 1 L. R. I. A. 321, 14 B. L. R.
 187: *Hunoomanpersad Panday's*
 case 6 Moore 393; 15 B. L. R.
 264; 23 W. R. 260; 25 W. R.
 148, 185, 202, 311.

(b) Chap. 1, Sec. 1, par. 28, 29.
 (c) 15 B. L. R. 270.
 (d) 10 B. L. R. 183.
 (e) *Raja Bishen Perakash Narain*
Sing's case, 12 B. L. R. 13 (P. C.).
 (f) 6 W. R. 193.



cution of a decree of Court, the purchaser under the execution is not bound to go back behind the decree in order to ascertain whether the Court was right in giving the decree, or having given it, in putting up the property for sale under an execution upon it. The purchaser need only satisfy himself that there is a decree against certain defendants, which is binding on them, and that the property sold is property liable to satisfy the decree. Having inquired into that, and having *bonâ fide* purchased the estate under the execution, his title is good (g).

Where money was borrowed by a near relative of a joint Hindu family (holding part of the ancestral property and appearing before the world as a coparcener of the family), to pay a *bonâ fide* ancestral debt, the loan was held to be a family debt, not merely a debt for which the borrower was personally liable (h).

Those who dispute a conveyance of this kind, can do so only by bringing a suit to have it declared illegal and void, on the ground of the property being ancestral: and a suit, brought by sons in their father's lifetime, for possession as proprietors on account of illegal alienation by their father, will not be entertained. A son's proprietary right in ancestral property was formerly held not to arise until after the death of his father (i), unless the father had expressly relinquished his rights (j). Subsequently when, as has been shewn, it was decided that according to the Mitakshara law, a son acquires by birth a right in ancestral property, and can during his father's lifetime compel a partition of such property, it was held that the cause of action to the son accrues when the purchaser takes possession,—that a new cause of action does not upon the subsequent birth of a younger brother, accrue either to the elder

(g) *Girdharee Lall v. Kantoo Lall*
1 L. R. I. A. 321 (334), 14 B.
L. R. 187 (199): 15 B. L. R. 264:
23 W. R. 260: 25 W. R. 148, 185,
202, 311.

(h) 7 W. R. 490.

(i) 7 N. W. P. 311, 365: 6 N. W.
P. 414: S. D. A. 1851, p. 352:
1857, p. 67: 1850, p. 282.

(j) 6. Sel. Rep. 65.



brother alone, or to him and the younger brother jointly,—and that a son cannot set aside alienations made before his birth (*k*).

But under the present law of Limitation (*l*), a suit by a Hindu governed by the Mitakshara to set aside his father's alienation of ancestral property must be instituted within twelve years from the date of the alienation.

In the case of Hindus of the Bengal school, *i. e.*, who are governed by the law of the Dyabhaga, the son does not on birth acquire any interest in ancestral property held by the father. The father can dispose of his property whether ancestral or self-acquired at his pleasure. The son's interest in the property does not accrue till the death of the father: and a suit to set aside an alienation of ancestral property, must be instituted within twelve years from the father's death (*m*). As a general rule, such suits will not lie except in cases in which under the general law an heir may dispute alienations made by him whom he represents,—for example, as made under undue influence, misrepresentation and fraud, and the like.

The members of a joint Hindu family (Bengal School) agreed among themselves not to partition their estate, and that it should "continue in one joint undivided occupation as at present." It was held that this agreement did not prevent a parcener from alienating his share: and that a purchaser, at a sale in execution of a decree, of the share of one of the contracting parties was not bound by the agreement (*n*).

The *kurta* or manager of a joint Hindu family may have power to mortgage the whole estate under certain circumstances. But he has not power to mortgage the share of one of the coparceners in order to pay off liabilities of that individual coparcener (*o*).

(*k*) 8 W. R. 15 (F. B.) and the cases referred to *ante* pp. 29, 30 notes (*z*) and (*a*).

(*l*) Act IX of 1871, Sch. 2, Art. 125.

(*m*) *Id.* Art. 126.

(*n*) 3 B. L. R. o. j. 14: 2 Hyde 97.

(*o*) 14 B. L. R. 21 (51).



Where a son sues to recover property sold by his father on the ground that the sale was made under such circumstances as not to be binding on him, if it is proved to the satisfaction of the Court that the purchase money was carried to the assets of the joint estate, and that the son had the benefit of his share of it, the son cannot recover his share of the estate without refunding his share of the purchase money. So, if it were proved that the sale was effected for the purpose of paying off a valid incumbrance on the estate, which was binding upon the son, and the purchase money was applied in freeing the estate from this incumbrance, the purchaser would be entitled to stand in the place of the incumbrancer, notwithstanding the incumbrance might be such that the incumbrancer could not compel the immediate discharge of it: and the decree for the recovery by the son of the ancestral property or of his share in it, as the case might be, would be to hold it subject to the incumbrance (*p*).

Where money has been advanced in good faith on a sale or mortgage which is subsequently set aside at the suit of a member of the joint family, the purchaser or mortgagee is usually deemed to be entitled in equity to a declaration that the property, the sale or mortgage of which is set aside, —or the share in it belonging to those who have received the benefit of his money,—shall remain charged with the repayment of the money paid by him. Where a father and his two sons, of whom one was a minor, owned certain ancestral property, the father borrowed Rs. 3000 and gave a bond for it. Being afterwards sued on the bond, a decree was passed against him. Under that decree, the ancestral property was attached and sold, and the holder of the bond was the purchaser. The two sons then sued to set aside the execution sale and to recover possession, on the ground of no assent and no legal necessity. It was proved that there was no legal necessity for the loan, but that it was made with the consent of the son who had attained majority. The

Court, in the interest of the minor, set aside the execution sale altogether: and ordered that the property should be restored to the two sons for the joint family. But the decree also declared that, on recovery, the property should be held in defined shares, *i. e.*, one-third by the father, one-third by the elder son, and the remaining one-third by the minor: and that the shares of the father and of the elder son should be jointly and severally subject to the lien of the lender and purchaser for the repayment of Rs. 3000 and interest (*q*).

On the necessity for a part only of the loan being established, the Court may order that the deed be set aside and that the plaintiff do recover possession upon his paying the amount taken up for purposes authorised by law, or that the deed be set aside only in proportion (*r*).

In the Courts of the Madras and Bombay Presidencies where for the most part the law of the Mitakshara prevails, it is held (contrary to the rule which prevails on this side of India) that one of several parceners in a Hindu undivided family may without the assent of his coparceners, sell, mortgage or otherwise alienate for valuable consideration, his share in the undivided family estate. And a share in the undivided estate of a Hindu family may be taken in execution under a judgment against the parcener to whom such share belongs, at the suit of his personal creditor (*s*). But a managing co-parcener *e. g.* a father, cannot alienate or charge the share of a minor coparcener in ancestral property except for the purpose of providing for some family need, or for the clear benefit of the joint estate (*t*).

In Bengal, a Hindu widow who has succeeded as heiress to the property of her deceased husband, cannot

(*q*) 12 B. L. R. 90. See *ante* p. 24 as to the case of minors.

(*r*) 4 B. L. R. 118 (127).

(*s*) 10 Bom. 139, and see the judgment of *Westropp*, C. J. in which all the authorities are referred to.

10 Bom. 162 (F. B.): 1 Mad. 471: 2 Mad. 416: 4 Mad. 60, 307.

(*t*) 6 Mad. 371: and see this case as to the *onus* of proof of necessity, and *bona fides*.



make a mortgage or sale which will be valid after her death, of any portion of such property, except when the sale or mortgage is made on account of some necessity, as the providing for her own maintenance, or of some indispensable duty connected with her husband, such as the payment of his debts or acts designed for his spiritual benefit. In the Calcutta Sudder Court a mortgage by a Hindu widow was at one time held to be absolutely invalid, if not proved by the mortgagee to have been incurred for the purposes of her necessary maintenance, or for some indispensable duty (u). But the rule thus laid down went too far.

There has been much discussion and some variety of decision on the question of the exact nature of a Hindu widow's estate, and the extent of her powers to deal with it. Latterly, however, the principles laid down in the case of *Hunoomanpersad Panday (v)*, have been applied to Hindu widows, whose power of dealing with the property of their deceased husbands in many respects resembles the power of the manager for a minor to deal with the property of the minor. The rule may be said now to be that one who lends money to a Hindu widow on mortgage of property belonging to her deceased husband's estate, is bound to inquire into the necessity for the loan, and to satisfy himself as well as he can that the widow is acting in the particular instance for the benefit of the estate: if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his mortgage: and he is not bound to see to the application of the money. A *bond fide* mortgagee will not suffer when he has acted honestly and with due caution, even if he be himself deceived. But though a purchaser for value is not bound to prove the antecedent economy or good conduct of the widow who alienates a portion of her husband's estate, or to account for the due appropriation of the purchase money, he is bound to use due diligence in

(u) S. D. A. 1849, pp. 64, 405: (v) *Supra*, pp. 19—21.
1857, pp. 401, 460.

ascertaining that there is some legal necessity for the loan, and may be reasonably expected to prove the circumstances connected with his own particular loan (*w*).

The Supreme Court, in the case of *Goluckmonnee Dabee v. Degumber Day* (*x*), said:—"No part of the entire interest, when the widow takes by inheritance, is in suspense or abeyance in any way, nor is there a reversion on a life estate, but the whole interest is in the widow. When she takes as heir under the Hindu law, she is ranked in all treatises as heir. Sir Francis Macnaghten treats her estate rightly as anomalous, and other writers treat it as coming to her as heir; therefore when they term it also a life estate, they mean that expression in a sense different from that of a pure and mere life estate. Such an estate as that last described, may exist as well under the Hindu, as under the English law. It exists when by donation, whether testamentary or *inter vivos*, property is given to one for life. In such a case, there would be no distinction in the nature of the interest, from that of a similar interest created by donation under the English Law. The law upon the point has been settled by the decision of the Privy Council in the case of *Cossinauth Bysakh v. Hurroosonderee Dossee* (*y*). On the first hearing of that case in this Court, the Court declared by its decree as to the estate of the widow, that she took an interest for her life in the immoveable estate, and an absolute interest in the moveable; on the latter point adopting a distinction between moveable and immoveable estate, which does not prevail in Bengal; and also failing to mark the limitation of the power of disposal as to moveables. The case was re-heard, and the Court by a subsequent decree, rectified its own decree, declaring as to both immoveable and moveable estate, that 'she should be declared entitled to the real and personal

(*w*) 1 Hay, 257: W. R. 1864, 2, p. 174.
 p. 153: 6 W. R. 262, 323. See 8 (x) 2 Boulnois, 193.
 W. R. 519: S. D. A. 1859, pp. (y) Clarke's Rep., Append. p. 91.
 207, 210, 421, 567, 1104: 1860, v.



estate of her husband, to be possessed, used and enjoyed by her as a widow of a Hindu husband dying without issue, in the manner prescribed by the Hindu law.' It therefore expressly corrected the declaration that she took an interest for life, and declared her entitled in unrestricted terms, limiting the restrictive terms to the possession, use and enjoyment of the property. This decision was affirmed on appeal; since that decision, the decrees of this Court in which it is necessary to declare what interest the Hindu widow takes, have been in conformity to it. It has been invariably considered for many years that the widow fully represents the estate; and it is also the settled law, that adverse possession which bars her, bars the heir also after her, which would not be the case if she were a mere tenant for life as known to the English law. Here the lessor of the plaintiff showed that the widow had made an alienation of the estate. Is the Court to assume it an unauthorized alienation? On what principle? We can discover none; there is neither authority nor principle to be found which would warrant the Court in saying, that under all circumstances, and whatever the nature of the suit or the position of the parties, or the rule which regulates the particular action, the presumption must ever be *primâ facie* against the validity of the alienation by a Hindu widow of the estate to which she succeeds as heir. Still less should that presumption be made, where possession has gone along with it for a long time, and a dormant title is asserted against a purchaser for value, after many years. We have looked carefully though the cases cited, and can find none that establishes any such position. In our opinion the law presumes neither against nor in favour of an alienation by a Hindu widow."

And in another case (z) *Colville*, C. J. said: "the estate of a Hindu widow is very different from a mere life estate. The case of *Cossinauth Bysack* which has long given the law to this Court establishes that the estate of the widow

(z) *Jadomoney Dabee*, &c. 1 Boulnois, p. 129.

is something higher than a life estate : that it entitles her to the possession of the property without restriction : and that she has a qualified power of disposition in it, the limits of which it is difficult, if not impossible, to define further than by saying that the propriety of any particular exercise of that power must depend on the circumstances under which it is made, and must be consistent with the general principles of the Hindu law regarding such dispositions. The cases of *Oojulmoney Dossee v. Sagormoney Dossee*, and *Hurrydoss Dutt v. Runjunmonee Dossee* (a) which have established in this Court the right of the reversionary heirs, though their interest is only contingent, to maintain a suit to restrain waste by the widow—particularly the latter case in which the late Chief Justice entered at large into the nature of the widow's estate,—are quite consistent with what I have stated. Sir Lawrence Peel there says 'the estate, though sometimes so expressed to be, is not an estate for life ; when a widow alienates, she does so by virtue of her interest, not of a power, and she passes the absolute interest, which she could not do if she had but a life estate.' "

The *onus* of proving the necessity for an alienation by the widow lies on the mortgagee or purchaser, if it be disputed by the next heir (b). But it is enough for the mortgagee or purchaser to prove that a legal necessity existed at the time of the transaction : and he is not bound to see to the appropriation of the money (c).

The payment of her husband's debts is a necessity justifying alienation by the widow,—but not (according to the Bombay High Court) the payment of a debt barred by limitation (d). So are payments reasonably made for religious or charitable purposes, and for the maintenance of the family. Thus the widow has been held to be justified in

(a) 2 Tayl. and B. p. 279.

13 Moore 209, 3 B. L. R. P. C. 57.

(b) *Koer Golab Sing v. Rao*

(c) 9 W. R. 501.

Kurun Sing, 14 Moore 176, 10 B.

(d) 6 Bom. a. j. 207.

L. R. 1 : *Raj Lukhee Dabee's case*,



raising money to meet payments (reasonable under the circumstances) for the *shrad* of her husband : for the marriage of his daughter and the maintenance of his daughter's sons : and for the widow's pilgrimage to Gya (*e*). But the digging of a tank though in itself a good and useful act, has been deemed unnecessary and not to justify an alienation of the husband's estate (*f*). And so, when the widow instituted a suit beneficial to her husband's estate, but not necessary, and she had an income from which she might reasonably have herself defrayed the cost of the litigation (*g*).

A sale by a widow was in the first instance contested on the ground that the property sold had been specifically devised by the deceased husband for charitable purposes. Failing to establish this point, the plaintiff sought to rely on the absence of proof of a legal necessity. It was held that under such circumstances the Court ought to be satisfied with less complete and positive evidence as to the necessity for the sale; than would have been required if the plaintiff had in the first instance contested the sale as made without necessity (*h*).

It has been held by the Supreme Court (*i*) that if a Hindu widow in Bengal does not spend the whole of the income derived from her husband's estate, the savings belong to her absolutely so that she can, by will or otherwise, dispose of them away from her husband's heirs. And accumulations made out of income which ought rightly to have gone from time to time into the hands of the widow but were wrongfully withheld from her by her husband's brother, were in another case decided by the High Court to be her

(*e*) 16 W. R. 52: 19 W. R. 426, 11 B. L. R. 118: 11 B. L. R. 416.

(*f*) 21 W. R. 49.

(*g*) 18 W. R. 121. And see generally the cases *supra*, as to

alienations by guardians of minors and members of joint families.

(*h*) 1 Mad. 28.

(*i*) In the goods of *Harendra-narayan, deceased*, &c. 4 B. L. R. o. j. 41, note (1).



separate property (*j*). But this cannot be said to be settled law. The matter has never been actually decided by the Privy Council on a contest between the widow or her heirs and the reversionary heirs of her husband. But their Lordships in a recent case (*k*) expressed the opinion that, if she took the estate only of a Hindu widow she would be unable to alienate the profits, or that at all events whatever she purchased out of them would be an increment to her husband's estate, and the husband's reversionary heirs would be entitled to recover possession of all such property real and personal. The question was raised, but not decided, in another *Mitakshara* case in the Privy Council (*l*) when their Lordships said that their decision in *Soorjeemonee Dossee v. Denobundo Mullick* (*m*) turned on the peculiar circumstances of the case, and is not an authority for the general proposition that a Hindu widow is absolutely entitled to or can dispose at her pleasure of accumulations of the income of her husband's estate.

Any alienation of her husband's property is valid if made by the widow with the consent of all (and not merely the *nearest*) heirs of the husband alive at the time of executing the deed by which the alienation is made (*n*). But the consent must be that of all those who are likely to be interested in disputing the transaction (*n*). The consent of the nearest reversioner for the time being has been held to create, as against a subsequent reversioner who eventually inherits, the presumption that the sale was good (*o*); but this must of course depend on the particular circumstances of each case.

(*j*) 6 B. L. R. 738 (746). See *Soorjeemonee Dossee's* case, 9 Moore 123.

(*k*) *Musst. Bhagbutti Dass v. Chowdry Bholanath Thakoor*, 2 L. R. I. A. 256 (260),—a *Mithila* case.

(*l*) *Gonda Koor v. Koor Oodey Sing*, 14 B. L. R. 159.

(*m*) 9 Moore 123.

(*n*) S. D. A. 1856, p. 596. See *Jadomoney Dabee v. Saradaprasanna Mookerjee*, 1 Boulnois, 131; W. R. 1864, p. 148; 3 W. R. 14; 7 W. R. 335.

(*o*) *Raj Lukhee Dabee v. Gokool Chunder Chowdry*, 13 Moore 209 (228), 3 B. L. R. P. C. 57.



When the deed by which the widow mortgages or otherwise alienates her husband's estate is attested by the reversioner, the mere fact of his attestation does not necessarily import concurrence in the act set forth in the deed. But it is, no doubt, an element to be taken into consideration and deserving of weight in the estimation of all the evidence of the transaction (*p*). And certain decisions to the effect that if a reversioner signs the deed as witness, his assent to the act set forth in the deed will without further inquiry be presumed (*q*), go too far.

If a Hindu widow alienates for other than allowable causes, property inherited by her from her husband, her act does not destroy her right, or vest the property in the reversioner. But the reversioner, without waiting for her death, may sue to obtain a declaration that the alienation is not binding except for her life, and also to prevent waste. A conveyance by a Hindu widow, for other than allowable causes, of property which has descended to her from her husband, is not necessarily an act of waste which destroys the widow's estate, and vests the property in the reversionary heirs; it is ordinarily binding during the widow's life. The reversionary heirs are not, after her death, bound by her conveyance: but they are not entitled, during her lifetime, to recover the property either for their own use, or for the use of the widow, or to compel the restoration of it to her. In deciding thus (*r*), the Court added, "Our decision will not preclude the reversionary heirs, even during the lifetime of the widow, from commencing a suit to declare that the conveyance was executed for causes not allowable, and is therefore not binding beyond the widow's life. Nor will it deprive the reversionary heirs, during the life of the widow, of their remedy against

(*p*) *Raj Lukhee Dabee v. Gohool Chunder Chowdry* 13 Moore 209 (228), 3 B. L. R. 57: 9 W. R. 350.

(*q*) S. D. A. 1856, 596. See S.

D. A. 1857, 271: 1860, v. 1, p. 625: 6 W. R. 52: 1 Agra, 50.

(*r*) W. R. Sp. 166. See 1 Hay, 339.



OF PERSONS CAPABLE OF MORTGAGING.

the grantee to prevent waste or destruction of the property, whether moveable or immoveable, in the event of their making out a sufficient case to justify the interference of the Court." In another case (s) the Court declared that if waste had been proved, the reversioner would have had a right to sue to restrain the widow from waste, "but his right to do this arises less from the necessity of protecting his own interests than from the function vested by the Hindu law in the next male heir of a person whose estate descends to a female, namely, that of protecting the estate."

If a reversioner suing in the widow's lifetime asks to have his right of inheritance declared, his prayer is premature, because it may be that he will not survive the widow. The reversioner, as being the person entitled to protect the estate, should sue merely for a declaration that the alienation by the widow, whether by way of mortgage or otherwise, has been made without such cause as in Hindu law justified such an alienation, and for a declaration that it will not be binding on the heirs after the death of the widow. What the reversioner is entitled to, is a declaration that upon the death of the widow, the right of inheritance will attach as if she had never made any alienation. The plaintiff must not pray for immediate possession.

Suits by a reversioner to restrain a widow or other Hindu female in possession from acts of waste, although his interest during her life is future and contingent, are suits of a very special class, and have been entertained by the Courts *ex necessitate rei*. If such a suit is brought, it must be brought by the reversioner with that object and for that purpose alone; and the question to be discussed is solely between him and the widow. He cannot by bringing such a suit get as between him and a third party an adjudication of title which he could not get without it. The reversioner, in suing to restrain the widow from acts of waste, may have to prove not only the waste, but a title sufficient to give him a *locus standi* in Court. But this does not necessarily

(s) 2 Hay, 608. See 9 W. R. 108.



give him a right to bring a third party into Court in order to obtain against him a final adjudication as to the title to succeed eventually to the estate. A declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court,—or under special circumstances as to jurisdiction in some other Court (*t*).

If in a suit against the widow, waste be proved, the Court is not competent to put the reversioner in possession absolutely, subject merely to maintaining the widow. But if the necessities of the case require it, the Court may take the estate out of the hands of the widow and appoint a manager who will manage under the orders of the Court, rendering due accounts and so forth. It may be not improper to appoint the reversioner to be manager (*u*).

If there were a necessity such as the Hindu law warrants, for a sale of part of the property, and the widow sold a larger portion of the estate than was necessary to raise the amount which the law authorised her to raise,—the sale would not be absolutely void as against the reversioners. They could set it aside only upon paying the amount which the widow was entitled to raise, with interest (*v*). And there is no rule of law which compels a widow who alienates a portion of her husband's property, to have recourse to a mortgage rather than to a sale: for the question whether in any particular transaction she has exceeded her powers, depends upon the necessities of each case (*w*).

Where a bond given by a widow for money borrowed by her, contains a recital that the money was borrowed

(*v*) See the judgment of the Privy Council in *Kathama Natchiar's* case 2 L. R. I. A. 169 (191), 15 B. L. R. 83 (110). And see 24 W. R. 86, 9 W. R. 108: 2 W. R. 244: 3 W. R. 183: 5 W. R. 131: 6 W. R. 222: 7 W. R. 119, 303. See 8 W. R. 155, 273:

1 Agra, 240.

(*u*) 1 B. L. R. a. j. 27: 24 W. R. 86.

(*v*) 9 W. R. 108, *per* Peacock C. J. See *Moulvi Mahomed Shamsul Hoojer v. Shewukram* 14 B. L. R. 226.

(*w*) 3 B. L. R. 375.



for the purposes of her husband's *shrad*,—the recital is no evidence of the fact as against the husband's heirs (*x*).

A purchaser from a widow is entitled to possession *during her life* whether the sale by her was allowable or not (*y*).

When a widow made over her husband's estate to her daughter who was the next heir, it was held that this gave the reversioner no present right of action, as his reversionary right was not prejudiced by the widow's act (*z*).

A widow may relinquish her rights in favor of the nearest heir, for the time being, of her husband. Her rights thereupon cease, and the property vests absolutely in the heir in whose favor she relinquishes (*a*).

A suit to have it declared that an alienation is improper, should be brought by those whose interests are directly affected (as the next heirs), not by those whose rights are merely future and inchoate. But a remote reversioner may interfere and sue if the widow and the transferee and the nearer reversioner are acting fraudulently and in collusion with each other (*b*). And the cause of action in a suit to recover property alienated by a widow arises on her death: during her lifetime the rights of the reversioners are only contingent, and the law of limitation will run only from the date of the widow's death (*c*).

A suit brought during the life of the widow, for a declaration that the alienation is good for her life only, is barred by the law of limitation unless brought within twelve years of the alienation by her (*d*).

(*x*) 9 W. R. 285.

(*y*) 6 W. R. 36: 7 W. R. 167: 1 Hay, 339. 2 Mad. 293.

(*z*) 1 Agra, 235. 2 Mad. 386.

(*a*) 6 W. R. 180: 8 W. R. 500. *Jadomoney Dabee v. Sarodaprosono Mookerjee*, 1 Boulnois, 131. See 1 W. R. 98.

(*b*) *Raj Lukhee Dabee v. Gokool-Chunder Chowdry*, 13 Moore, 209, 3 B. L. R. 57: *Koor Gopal Singh v.*

Rao Kurun Singh, 14 Moore 176, 10 B. L. R. 1: 24 W. R. 86: 1 Agra F. B. 57.

(*c*) 9 W. R. 505 (F. B.); 4 B. L. R. F. B. 3: and see *Amirtalull Bose's case* 15 B. L. R. 10, 23 W. R. 214: 3 B. L. R. a. j. 437. See S. D. A. 1859, pp. 631, 681: 7 W. R. 450: 8 W. R. 519.

(*d*) 20 W. R. 1. Act IX of 1871 sch. 2 art. 124.



The assignee of a reversionary heir has no such interest in the estate as will enable him to bring a suit to have a mortgage and decree declared not binding on the estate. And this is so, even though the assignee is the next reversionary heir after the assignor (e).

If a Hindu dies leaving two widows and no nearer heirs, they take a joint estate. They take their husband's property as one, in coparcenery, with a right of survivorship: and there can be no alienation or testamentary gift by one widow without the concurrence of the other. This is the case both in the Bengal school and under the Mitakshara (f). It has been held that one widow can insist upon a partition as against the other—notwithstanding the limited character of their tenure; but such partition may not be binding on the reversioner (g). It has also been held that a purchaser of the estate of one of two widows, at a sale in execution of a decree, may enforce a like claim (h).

But it has been decided in Madras (i) that one of several widows who share their husband's estate jointly by inheritance, cannot claim an absolute partition so as to give to each a share in severalty,—though it may be right under certain circumstances to give separate possession of a portion of the inheritance.

On the death of one widow, her interest in her husband's estate survives to the other widow. Therefore no cause of action (as against third parties) can accrue to the reversioner until the death of the surviving widow, even in respect of a moiety of the property (j).

Under the Mitakshara law, if a husband dies solely possessed of property and leaving a childless widow as his heiress, the estate which she takes is similar to that taken under the like circumstances by a widow according to the

(e) 3 B. L. R. o. j. 71. See 9 W. R. 464. But see *contra* Mara. 622.

(f) *Bhugwandeon Doobey v. Myna* Base, 11 Moore 487, 9 W. R. P. C. 23; 6 B. L. R. 134.

(g) 6 B. L. R. 134.

(h) 18 W. R. 23.

(i) 3 Mad. 424.

(j) 23 W. R. 125. See 3 B. L. R. a. j. 289.

law of the Bengal school. The power of the widow over property inherited from her husband is limited, and on her death it passes to her husband's heirs (*k*). And there is no distinction in this respect between ancestral and acquired property (*l*).

A decree fairly obtained against the widow, as representing her husband, is binding upon his estate and upon the reversioners. In the case of the *Rajah of Shivagunga* (*m*) their Lordships of the Privy Council said that, assuming the widow to be entitled, as heiress of her husband, to the zemindary in dispute, "the whole estate would for the time be vested in her,—absolutely for some purposes, though in some respects for a qualified interest: and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow. And it is obvious there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

When a widow who was not her husband's heiress, sold certain property belonging to his estate, *bonâ fide* for the purpose of paying off debts which had been contracted by the deceased, and the heirs came forward and caused the sales which she had made to be set aside, it was held that the purchaser, the sale to whom had been declared void, might claim, as against the heirs, to stand in the position of one who had advanced money to a childless widow for proper purposes, or at any rate that he might be considered entitled to have those charges which his monies had

(*k*) *Must. Thakoor Deyhee*, v. *v. Koolahul Sing*, 3 Moore 331.
Rai Baluk Ram, 11 Moore, 139; (*l*) *Must. Thakoor Deyhee*, v.
 2 Ind. Jur. 106: *Bhugwandeon* *Rai Baluk Ram*, 11 Moore 139,
Doobey v. Myna Bacc, 11 Moore, 2 Ind. Jur. 106.
 487, 9 W. R. P. C. 23: 3 W. R. (*m*) 2 Moore 539, 2 W. R. P.
 105: 8 W. R. 519: *Keerat Sing*, C. 31.



satisfied revived against the inheritance. The heirs were declared liable for the amount of the purchase money to the extent of the assets of the deceased received by them (*n*).

One who, without inquiry, purchased from a Hindu wife, whose husband was alive, was held—in a suit to have it declared that the property belonged to the husband and not to the wife—to be in no sense a *bond fide* purchaser without notice of the husband's rights (*o*). But if a husband allows his wife to appear as the owner of an estate, and she mortgages it, and the husband subsequently ratifies her act, neither the husband nor an execution creditor of his can set aside the mortgage on the ground that the wife was not the owner (*p*).

The estate taken by a mother who inherits from her son, or a daughter who inherits from her father, is similar in all respects to that of a widow who is her husband's heiress. Thus where the daughter while in possession of the paternal estate borrowed a large sum of money on mortgage, and only part of the money was borrowed under any legal necessity,—it was held (in a suit by the next heir after the daughter's death to recover the property mortgaged), that the mortgage must be set aside, upon repayment by the next heir of the amount which was borrowed under legal necessity (*q*).

It would seem that by Hindu law a son is bound to provide his mother with a suitable place in which to live: and that therefore a son who has inherited from his father a house in which the family in his life time lived, cannot sell the house without providing a suitable residence for his mother (*r*).

A widow who is not her husband's heiress, has a right to maintenance out of his estate. As against the heir she has a right to maintenance out of the property belonging to

(*n*) 1 Agra, 291.

(*o*) 6 W. R. 312.

(*p*) 8 W. R. 67.

(*q*) 5 B. L. R. 176. See 14 B.

L. R. 235; 6 Bom. a. j. 215.

(*r*) 4 B. L. R. o. j. 72. See 1

I. L. R. All. 262. See 1 I. L. R.

Cal. 470.



the estate. She has also a right to maintenance out of such property in the hands of any one who takes it with notice of her claim for maintenance. But she has no lien or charge on the property as against third parties, irrespective of notice (*s*).

In Bengal a Hindu has power by will to give all his property to his widow absolutely, though he thereby disinherits his own sons (*t*).

The creditor of a deceased Hindu does not obtain any better position as against the debtor's estate, than that which he enjoyed during the debtor's lifetime. When the estate has passed to the heirs of the debtor, the creditor may have recourse to it, so long as it remains in their hands, for the satisfaction of his debt. If he allows the heirs to dispose of the estate to a *bonâ fide* purchaser, he cannot follow it in the hands of the purchaser, but has only a right to bring a suit against the heirs personally, who are responsible to him to the extent of the assets they receive. A creditor whose debt is not secured by a mortgage or hypothecation, has not on the death of the debtor such an interest in his estate, as prevents the heirs from selling it to a *bonâ fide* purchaser so as to confer upon him a clear title. The purchaser does not take the property subject to the claim of the creditor (*u*).

And the rule is the same as regards the estate of a deceased Mahomedan (*v*).

A Mahomedan widow's right to dower is usually simply in the nature of a debt which she, like any other creditor, can take legal means to enforce against such property of her deceased husband as she can find in the hands of his heirs. If she is herself in possession of her husband's estate, she has a lien on it in respect of her own debt, as

(*s*) 8 B. L. R. 225; 9 B. L. R. 11. R. o. j. 7: 24 W. R. 366: 2 W. R. 296. So 9 Bom. 116.

(*t*) 10 B. L. R. 267. See 7 B. L. R. 697. (*v*) 10 W. R. 216, 1 B. L. R. a. j. 172: 20 W. R. 93.

(*u*) 1 Agra F. B. 72: 3 B. L.



against the other heirs, and is entitled to pay her own debt in preference to any other (*w*). She cannot legally alienate property devolving upon her as dower, without the consent of the other heirs of her husband: and a mortgage made by her without such consent may be set aside by them (*x*).

As a general rule of Hindu law, property given for the maintenance of religious worship and of charities connected with it, is inalienable. But it is nevertheless competent for the *shebait* of property dedicated to the worship of an idol, in the capacity of *shebait* and manager of the estate to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the *shebait* of an idol's estate would appear to be in this respect analogous to that of the manager of an infant heir as defined in *Hunumarpersud Panday's* case (*y*). It is only in an ideal sense that property can be said to belong to an idol: and the possession and management of it must in the nature of things be entrusted to some person as *shebait* or manager. It follows that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. And assuming that a *shebait* may incur debts or borrow money for necessary purposes, it appears right and reasonable that judgments obtained against a former *shebait* in respect of debts so incurred should bind succeeding *shebait*s, who in fact form a continuing representation of the idol's property (*z*).

(*w*) 20 W. R. 93: 3 B. L. R. a. j. 175: 6 B. L. R. 54.

(*x*) 8 N. W. P. 45. See 1 Agra 151, 288.

(*y*) See ante pp. 19, 20: 6 Moore 123.

(*z*) *Prasanno Kumari Debys v. Golab Chaud Baboo* 2 L. R. 1. A. 145 (151), 14 B. L. R. 450 (458):

Shibeesuree Debia v. Mothoornath Acharjee, 13 Moore 270.

And accordingly where decrees had been obtained against a *shebait* upon his bond, for the repayment of money said to have been borrowed for the service of the idol, and the decrees directed that the debt should be paid by the *shebait* personally, and if not, should be realised from the profits of the *dewuttur* lands—the Privy Council held (in a suit by the successors of the *shebait* to have the *dewuttur* property released from attachment) that the decrees being untainted by fraud or collusion, and having been passed after the necessary and proper issues had been raised and determined, were binding on the succeeding *shebait*s (a).

Though the *shebait* cannot alienate the *dewuttur* lands, he can create derivative tenures and estates conformable to usage (b).

When the endowment is merely nominal, and not *bond fide*, the property will be dealt with in the ordinary mode, and will not be treated as property set apart for religious purposes. And it is not merely because a person purchases property in the name of an idol, or conveys it to an idol, that this is to be considered a dedication of the property to religious purposes which renders it inalienable. There must be clear evidence of a real endowment and that it was the intention of the donor, subsequently *bond fide* acted on, that the worship of the idol should be kept up for the benefit of his heirs in perpetuity or of the public (c).

It is frequently difficult to say whether there has or has not been a real dedication to religious purposes which makes the property inalienable. In a case in which the deeds relied on contained provisions for the endowment and support of idols and their worship, which were in the nature of trusts impressed on the property to be performed by the donee,—the Privy Council said (d) “In

(a) *Prosunno Kumari Debha's* case, 14 B. L. R. 450.

(b) *Shibossuree Debia v. Mothoor-nath Acharjee* 13 Moore 270. So 15 W. R. 228; 18 W. R. 439.

(c) *Mahavanees Brajsoondery De-*

bia v. Ranees Luckmee Koonwarees 20 W. R. 95 (P. C.); 14 B. L. R. 175; 5 W. R. 158; 3 W. R. 142.

(d) *Rajah Chundernath Roy v. Koor Gobindnath Roy* 11 B. L. R. 86 (112).



the case of a bare trust leaving no beneficial enjoyment to the donee, there would be strong ground for the implication that the property was not alienable and was to descend to the donee's heirs as trustees in succession. But it was contended that in these grants the trust is coupled with an interest, giving the donee a right to the enjoyment of the surplus as a fruit of the property, after making due provision for the sustentation of the idols and their worship, and therefore that there is a beneficial ownership capable of alienation. The case of *Sonatun Bysack v. Sree Juggutsoondree Dossee* (e) was cited to shew that such a beneficial interest may exist as a secular right in property dedicated primarily to the worship of idols. In that case, it is true, a disposition of the surplus was expressly made by the will of the donor : but their Lordships do not doubt that cases may occur where, from the nature and terms of the gift, the intention of the donor to confer a beneficial and alienable interest in the property dedicated may be inferred * * * It would unquestionably be more consonant with the genius and spirit of Hindu law and usages that endowments of this kind should be made to a family by whose members in succession the worship might be performed, than to an individual who might sell or give them to a stranger."

A *shabait* cannot get rid of the trusts to which he is subject, merely by reason of resumption proceedings resulting in a settlement for revenue with him in his private character. The settlement in no degree relieves the *shabait* of his trust : and does not render alienable land which, irrespectively of it, was not alienable (f).

The Mahomedan law as to mortgaging or otherwise alienating *wuqf* land, is in many respects similar to the Hindu law as regards *dowuttur* property. Those aliena-

(e) 6 Moore, 66.

Sukheemoy Dossee 14 Moore 280

(f) *Jugut Mohini Dossee v. Must.* (305).



tions only which fall within the scope and spirit of the endowment, or which are necessary for its maintenance or protection, will be supported (g).

When land subject to a mortgage is set apart as *wuqf*, the existence of the mortgage does not invalidate the endowment. The endowment is subject to the mortgage. If after having made a mortgage, the mortgagor dedicates the property as *wuqf* and dies leaving sufficient assets, his heirs are bound to apply them to the redemption of the mortgage, so as to set the endowment free. But if necessary, the mortgagee may enforce his mortgage by sale of the land: and the endowment will be rendered void as against the purchaser under the mortgage. But it will not be void as against the heirs of the grantor; as against the latter, the surplus proceeds will be subject to the endowment (h).

In the case of a mortgage by conditional sale, the right of pre-emption does not arise until the sale is made absolute (i).

A suit for pre-emption may be brought as soon as the sale becomes absolute on foreclosure, even although the mortgagee has not taken possession (j). And it has been held that a claim to the right of pre-emption should be made immediately on the sale becoming absolute (k). In another case, however, the Court decided that a suit brought by one who claims the right of pre-emption, is not barred by lapse of time if brought within one year from the date of the mortgagee's actually getting possession (l).

(g) 8 N. W. P. 433 : 5 W. R. 158. See Macnaghten's Mahomedan Law, 328 : Baillie's Mahomedan Law (2nd Ed.) pp. 605 *et seq.* Also, 15 B. L. R. 167.

(h) 4 B. L. R. a. j. 86.

(i) 2 W. R. 215 (F. B.). See also 5 W. R. 76.

(j) W. R. 1864, p. 285.

(k) 6 W. R. 117.

(l) 2 W. R. 5. So, Act IX of 1871, Sch. 2, Art. 10.



CHAPTER IV.

OF MORTGAGE CONTRACTS.

PARTIES may enter into a contract of mortgage in the same manner as they may make any other contract,—that is to say, their agreement may be either verbal, or in writing. Proof of the existence of the contract is all that is necessary, and if satisfactorily established, a verbal agreement will be given effect to (a).

At the same time, verbal contracts are so open to misconstruction and fraud, and there is so much difficulty in proving them after a long lapse of time, that they are to be especially distrusted in the case of mortgages of land, where disputes seldom arise until some considerable period has passed. Moreover, all documents, not testamentary, duly registered under the Registration Act, and relating to any property whether moveable or immoveable, take effect against any oral agreement or declaration relating to the same property unless where the agreement or declaration has been accompanied or followed by delivery of possession (b). Consequently mortgages by merely verbal agreements, are seldom met with in practice: and no mortgagee is safe unless he has a written instrument of mortgage duly registered.

A deposit of title deeds as security for money, in English law known as an “equitable mortgage,” is treated as a

(a) 4 Sel. Rep. 168. See also 1 B. L. R. F. B. 58 (64), 10 W. R. 2 Sel. Rep. 74: 4 N. W. P. 219: 51.

(b) Act III of 1877, sec. 48.



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valid simple mortgage of the whole property to which the deeds deposited refer, and is subject to the same rules as an ordinary simple mortgage (c).

A sum of money was paid as a loan, and thereupon (at the time of receipt of the money) title deeds were deposited by way of security for the repayment of the advance. It was held that this was a complete equitable mortgage, and that the mortgagee was entitled to a decree upon it, although he subsequently took from the mortgagor a written memorandum of deposit which was not registered as it was necessary it should have been before it could be put in evidence (d). But this case turned entirely on the special circumstances proved: and as a general rule there is no doubt that if there is any written document of deposit or mortgage, it ought to be registered. In another case,—upon the date on which a sum of Rs. 20,000 was repayable, the debtor sent his creditor the title deeds of certain property along with a letter in which he stated that he sent the deeds as a collateral security for the debt which he was unable to pay. It was held that the letter could not be separated from the deposit of the title deeds, and that registration was necessary. The Court observed: "This is not a case in which the charge on land is implied from the deposit of the deeds themselves, neither is it a case where the charge or the equitable mortgage is made expressly by parol (e)".

In all cases, much risk and confusion are avoided by having a short and accurate deed, attested by at least two credible witnesses, and duly registered, which may itself testify to the real facts and the intentions of the parties contracting.

(c) 6 Sel. Rep. 165. See the judgment of the Privy Council in *Yarden Seth Sam v. Luckpathy Royjee Lallah*, Marsh. 461, 9 Moore 303: 7 N. W. P. 450.

(d) 11 B. L. R. 405 (412).
(e) 7 B. L. R. 55. See as to the deposit of title deeds, 4 Mad. 369: 6 Mad. 455.



A mortgage deed should set forth shortly but distinctly, all the material points of the agreement into which the parties really intend to enter (*f*). It should state with strict accuracy, the consideration given, the locality and description of the property pledged, (*g*) the nature of the mortgage, the length of time it is to remain in force, and any other conditions which the parties may have agreed upon, together with the date of the execution of the deed.

The stipulations as to the payment of interest should be accurate and clear: for interest will not be allowed unless it is included in the agreement. Thus in a case where the mortgagee had not the usufruct of the property, the mortgage deed was silent on the subject of interest: and the Court on account of this silence refused to allow any interest from the date of the deed up to the time when the money lent became re-payable (*h*).

If more deeds than one are requisite in order to carry out the arrangement between the parties, but all of them forming part of the mortgage contract, each should contain a reference to the others, so that it may appear on the face of them that they all are but one transaction and must be taken in connection with each other. For example, in making a mortgage by conditional sale, it is a common custom to make an absolute sale of the property, and at the same time to execute an ikrarnama declaring the sale to be only conditional and made in fact by way of mortgage. A reference in each of these deeds to the existence and purport of the other, will be preventive of fraud and a protection to all parties (*i*).

If the ikrarnama is substantially part of the original arrangement, the fact that it is dated two days after the

(*f*) For precedents of mortgage deeds of different kinds, see Appendix.

(*g*) As to the description of parcels, the provisions of sec. 21 of the Registration Act III of

1877, must be kept in view.

(*h*) S. D. A. 1855, 54. See 1854, 514, 518: 1 Agra F. B. 63 (68): 18 W. R. 62.

(*i*) 8 N. W. P. 564: 10 N. W. P. 223: 4 Sel. Rep. 174.



principal deed which purports to be one of absolute conveyance, does not prevent the transaction being one of mortgage only (*j*). And three deeds all executed on different dates, *viz.*, a lease of the 16th of May, a mortgage deed of the 5th of June, and an ikrarnama of the 29th of August, have been held together to make up one mortgage transaction (*k*).

A mortgage deed was executed in the ordinary form. Two days afterwards the mortgagees executed an ikrarnama in which they undertook to pay Rupees 110 to the mortgagor as subsistence money. The latter instrument did not mention, and was not mentioned in, the former. The mortgagees subsequently transferred their rights under the first deed to third parties. It was held that these assignees were not liable to pay the subsistence money. "There is nothing whatever to connect the subsequent engagement with the mortgage deed, nor can any privity of contract between the mortgagor and the parties to whom the mortgage was afterwards transferred by deed, be inferred from the evidence or circumstances of the case" (*l*).

It used to be held that the terms of a written deed might be varied or modified by a verbal agreement, and that a deed which on the face of it was one of absolute sale, might by a verbal agreement be converted into one of mortgage (*m*).

More recently it was held that parol evidence was not admissible to vary or alter a written contract, in cases where there was no fraud or mistake, and in which the parties intended to express in writing that which their words imported. Therefore where there was a written bill of sale, absolute on the face of it, a contemporaneous verbal agreement that the transaction should be one of mortgage only, was not admissible in evidence (*n*). But a prior

(*j*) 2 Hay, 256, W. R. Sp. 79.

S. D. A. 1850, p. 362; 1861, v. 1, p.

(*k*) *Shah Mukhun Lall v. Baboo*

189: 1 Hay, 325: 8 N. W. P. 473.

Sreekishen Sing, 12 Moore 157.

(*n*) 5 W. R. 68 (F. B.), and

(*l*) 11 N. W. P. 6.

76 (F. B.). See also 6 W. R. 111:

(*m*) S. D. A. 1858, p. 741. See

2 Agra, 163.



written contract might be varied by a subsequent verbal one, in cases in which the law did not require the contract to be in writing (*o*). And parol evidence was admissible to explain the acts of the parties (*p*).

When the deed of sale stated that the purchase money "was paid and it was necessary to give possession to the purchaser,"—but possession was not given, and the seller remained quietly in possession for two years, it was held that the sale had never been completed, and that it was open to the plaintiff to show that this was so and that the money was not paid (*q*).

The present law on this subject is to be found in the Indian Evidence Act I of 1872, which provides (*r*) that when the terms of any contract, grant, or disposition of property, which has been reduced to the form of a document, have been proved (*s*), no evidence of any oral agreement or statement shall be admitted as between the parties to such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from, its terms. But any fact may be proved which could invalidate the document, or which could entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law (*t*). And the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms,—or the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under the contract, grant or disposition of property,—may be proved (*u*). So also may the existence of any distinct subsequent oral agreement to rescind or

(*o*) 5 W. R. (F. B.) 68.

(*p*) *Ib.* pp. 71, 72.

(*q*) 7 W. R. 403. See 8 W. R.

339.

(*r*) Sec. 92.

(*s*) As to how a contract &c. reduced to writing is to be proved, see sec. 91.

(*t*) Sec. 92, Proviso 1.

(*u*) *Ib.* Provisos 2 and 3.



modify any contract, grant or disposition of property except in cases in which the contract, &c. is by law required to be in writing, or has been registered according to law (*v*). And any usage or custom, by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved, if not repugnant to or inconsistent with the express terms of the contract (*w*).

Contracts are to be dealt with and deeds construed according to the real intention of the contracting parties disclosed by the transaction (*x*). It is therefore not necessary that a mortgage should be called a mortgage by name, or that the class to which it belongs should be expressly stated. An agreement that "until the amount of the bond shall be paid, the debtor will not transfer certain property by sale, mortgage, or gift," has been held to be a simple mortgage of the property mentioned. So, a money bond containing a stipulation that until the money was re-paid, the debtor would not alienate his rights as zemindar in any other quarter, was held to be a bond in the nature of a simple mortgage (*y*).

But all depends upon the terms of the contract between the parties and its being clear that the intention was to create a mortgage. And probably a bond for the payment of money with a simple covenant not to alienate certain lands until payment, would not be deemed to constitute a mortgage unless there were something in the document to show that the intention was to pledge the lands by way of security.

This question was much discussed in a case (*z*) in which the majority of a Full Bench Court were of opinion that the language used in the deed which was the subject of suit shewed that it was the intention of the parties that

(*v*) *Ib.* Proviso 4.

N. W. P. 124 : 8 N. W. P. 669 :

(*w*) *Ib.* Proviso 5.

7 W. R. 309 : 2 Agra, 124.

(*x*) See the case of *Hunoomanpersad Panday*, 6 Moore 393 (411).

(*z*) 5 B. L. R. 264 (F. B.), and see the various cases there quoted.

(*y*) 5 B. L. R. 264 (F. B.) : 7



the lands mentioned should be a security for the debt,—and that if the intention could be collected from the instrument, the form of expression was not material (a).

And so long as the nature of a transaction is substantially such as to stamp it as belonging to a particular class of mortgage, the mere calling it by a different name will not transfer it to another class. Thus, where there was an absolute sale, but the purchaser gave an ikrarnama with a condition that if the vendor re-paid the purchase money and interest by a fixed day, the purchaser would re-convey the estate to him, it was contended that this was a redeemable sale only, and not a mortgage by conditional sale, nor governed by the rules applicable to such mortgages. But the Court held, that “redeemable sales,” and “mortgages by conditional sale,” were in their nature identical, and merely different modes of expressing the same thing, and that therefore a redeemable sale could be foreclosed only in the same manner as a mortgage by conditional sale (b).

A mortgage in the common English form, has been held to fall within the operation of Reg. XVII of 1806: and notice of foreclosure must be given, and the year of grace. Such a mortgage “is in all respects parallel with the mortgage common in this country which is effected by means of a bill of absolute sale together with a contemporaneous ikrar for re-conveyance: and mortgages of this sort have always been treated as subject to the Regulation” (c).

So, zur-i-peshgee leases are treated in all respects as usufructuary mortgages (d), when they contain a proviso either express or manifestly implied, for redemption. But when the mortgage is by way of lease, it is desirable that

(a) *Ib.* p. 272.

(b) 8 N. W. P. 564. See 4 Sel. Rep. 174: *Radhabenode Misser v. Kripamoyee Debee*, 14 Moore 448.

(c) 5 P. L. R. 389 (393).

(d) *Supra*, Chap. II. See S. D. A. 1857, p. 1232: 1859, p. 977: 2 Hay, 159: 6 W. R. 6: 20 W. R. 178.



the deed should declare expressly that the lease is in fact given as a mortgage security : and there should be a condition that if the advance is not re-paid when the lease expires, the mortgagee shall be entitled to hold on, until his claim is satisfied. Where there was no such condition, but on the contrary it was stipulated that if at the expiration of the term for which the lease was granted, the lessor failed to pay down at one time the whole amount of the advance made, the lessee should be at liberty to take such steps as might be deemed proper to recover the amount from the lessor,—it was held that the absence of a proviso that the lease should continue until re-payment, more especially when the deed contained a condition that the amount might be recovered from the mortgagor, distinguished and removed the case from the ordinary category of leases held to be usufructuary mortgages (e). So the simple advance of 500 Rupees in consideration of receiving a lease for twelve years was held not to be a mortgage transaction, in the absence of any appearance of intention that it should be taken as such (f). In another case a lease for twenty years was granted, which provided that on the expiry of the twenty years the land should be made over to the lessor, and that the lessee alone should benefit by any improvement of the property or increase in the rents, and should bear any loss of rents or decrease in their amount. The Court said (g) : “The deed before us is in fact an absolute sale of a lease for a fixed period, to which the rules common to mortgage transactions cannot be applied, as the extinction of the original debt is not solely dependent on the receipt of adequate profits, but on profits *whatever they may be* during the continuance of the lease. Should they fail, the debt is neither realisable from, nor secured by, any other resources : this is no device, but a substantial risk entitling the lender to any benefit from the bargain.”

(e) 8 N. W. P. 356.

25 W. R. 10.

(f) S. D. A. 1855, p. 481. See

(g) S. D. A. 1857, p. 1232.



Lands were conditionally purchased by A, who paid down a certain sum of money and agreed to pay a further sum seven years afterwards : upon making the latter payment, A was to be put in possession, and the borrowers were within ten years from that date to pay off the whole loan and redeem their lands. A never advanced more than the first sum, and he never got possession. It was held that the transaction did not amount to a mortgage, and that the money which A advanced was a simple debt for which there was no lien on the lands (*h*).

A *malguzar* of a village in the Central Provinces mortgaged it by a deed in which he declared,—“if I fail to pay the money as stipulated I and my heirs shall without objection cause the settlement of the said village to be made with you.” It was contended that this amounted to a conditional sale. But the Privy Council held that it was only a simple mortgage hypothecating the right of the party to the village, and that the deed was not meant to operate by way of conditional sale. Their Lordships remarked that at the time the deed was executed the *malguzar*’s right in the village was such that the consent of the Revenue officers would have been required in order to carry out such a stipulation : but that supposing the *malguzar* had had full proprietary rights “the instrument would not like an ordinary deed of conditional sale, have imported in terms a sale of the interest of the party which was to become absolute and conclusive upon his failure to pay the stipulated sum at a certain date. Such a contract would independently of any rule of law to the contrary execute itself : and the remedy of the party upon it would, if he were out of possession be a suit for possession.” Again,—“If the security was in the nature of a simple mortgage the proper course for the mortgagee to pursue was to raise the amount for which they had obtained a decree by the sale of the village, paying the surplus proceeds, if any, to the mortgagor” (*i*).

(*h*) S. D. A. 1858, p. 1491.

L. R. 205 (210, 212).

(*i*) *Gokuldoss v. Kriparam* 13 B.

A borrowed money from *B*, and by deed (in which nothing was said about interest) agreed that if he did not repay the sum borrowed on a day specified he would give the lender a putni lease of certain lands, the original sum borrowed being deemed the *bonus* for such lease,—and that if *A* did not grant the putni, then the deed of agreement itself should be deemed a putni pottah of those lands. *A* did not pay the money and did not grant a putni lease. It was held that the transaction was in no sense a conditional sale, but that *B* was entitled to possession as on the footing of a putni from the date of suit, though the putni would be redeemable (*j*).

From badly drawn instruments it is often difficult to discover what the exact nature of the transaction has been. This obscurity ought to be avoided, as the whole position of the parties may depend upon the class to which the mortgage belongs. (*k*). The Agra Sudder Court once held that when a deed is so loosely worded as to admit of more than one interpretation, the Courts will construe it in the sense most favourable to the mortgagor (*l*). But it has also been decided that if a deed is ambiguous as to the property conveyed, it will be read most strongly against the mortgagor the conveying party (*m*). Where the construction to be put upon the contract is doubtful, the conduct of the parties may be looked to as shewing in what manner they understood the terms of the agreement (*n*).

In mortgages of an usufructuary nature, it should be stated clearly whether the profits are to be taken in lieu of interest only, or whether they are in lieu of both principal and interest: because in the latter case the pledger is not personally liable (except under particular circumstances), and the mortgagee must look to the land alone for payment of his debt and the interest thereon (*o*). The personal

(*j*) 19 W. R. 274.

(*k*) 8 N. W. P. 356, 370, 447.

(*l*) 5 N. W. P. 113.

(*m*) 18 W. R. 63.

(*n*) 2 Agra, 150.

(*o*) 3 N. W. P. 211: 1 Sel. Rep. 121. See S. D. A. 1857. p. 1232: 20 W. R. 178.



liability of the mortgagor in a usufructuary mortgage depends wholly on the terms of the contract (*p*). If the intention was to charge the land with the interest alone, the mortgagee has only the personal security of the mortgagor for the principal (*q*).

A plaintiff objected to the allowance of interest at a rate in excess of the usufruct, and the Court held the objection to be good, saying : " when it is manifest that the usufruct does not amount to simple interest at a legal rate, and there is no rate of interest stipulated for, the presumption is that the usufruct was deemed by the mortgagee sufficient interest for his money debt, and that the mortgagor is not bound to pay a further sum to make up any particular rate; the law is satisfied if no more than legal interest is received, and the Court has nothing to do with the accounts if less than that amount has been taken. In the present case, as no rate of interest was stipulated for, and the usufruct does not exceed a legal rate, the mortgagee must be considered as having agreed to take that and rest satisfied with the security the land afforded for regular payment. We therefore modify the Judge's decree, by declaring plaintiff entitled to recover possession when able to pay up the amount of the principal of his debt, defendant retaining the land as security for interest till such debt is paid" (*r*).

The parties may make any conditions or covenants they please, so long as these are not in themselves illegal (*s*), as—that the mortgagee in possession shall pay the mortgagor a certain allowance or rent (*t*) : that the loan shall be repaid by instalments, and that in default of payment of any one instalment, the mortgagee shall be entitled to foreclose for the balance then due (*u*) : that no payment made by the debtor shall be allowed, unless it is duly endorsed on the deed (although the Courts will notwithstanding such a con-

(*p*) 6 W. R. 288.

(*q*) Marsh. 209.

(*r*) S. D. A. 1860, v. 2 p. 223.

(*s*) 7 N. W. P. 307.

(*t*) S. D. A. 1862, p. 577.

(*u*) 7 N. W. P. 322.



dition, admit proof of payment of a sum not so endorsed) (v) : that after payment of Government revenue and village expenses, the mortgagor shall pay to the mortgagee the entire surplus collections and also all that may be derived from alluvion, and that if in the month of Jeyt in any year the whole surplus is not paid to the mortgagee, he shall be entitled to enter into possession (w) : that if any ground shall be lost from the encroachment of a river bordering on the estate, the mortgagor shall make good the loss, and if any thing is gained from the same river, the mortgagee shall make an allowance for it (x) : that a third party named, as well as the mortgagor, shall have the right of redeeming (y) : that the mortgagor shall make good the balances of rent unpaid by cultivators (z) : that the mortgagor shall not alienate or mortgage his interest until the debt is paid off with interest (a) : that the mortgagor, not retaining possession, shall pay the Government revenue,—and any other such agreements.

The property intended to be mortgaged should be described so that it may be readily recognised and identified, and so as to meet the requirements of the Registration Act (b). In a case before the Bombay Courts, it appears that in the document by which a certain village was mortgaged its boundaries were not given, it being described merely by name. Subsequently by reason of some proceedings of the Survey officers the size of the village was much increased. It was held that the mortgagee was under the circumstances entitled to the benefit of this increase (c).

It seems that words used in a future sense, such as “and whatever property I may hereafter acquire,” or words which are general and do not refer to any specific property, will

(v) S. D. A. 1853, p. 544: 8 W. R. 316. 1 I. L. R. Bom. 45.

(w) 8 N. W. P. 70.

(x) S. D. A. 1852, p. 928. See 11 Bom. 32.

(y) 3 N. W. P. 187.

(z) 7 N. W. P. 482: 8 N. W. P. 70.

(a) 6 N. W. P. 39: 7 N. W. P.

614: *et passim*.

(b) Act III of 1877, *sect.* 21, 22.

(c) 11 Bom. 32.



not give any lien to the mortgagee, as against an intermediate *bond fide* purchaser. Where there was a mortgage of certain villages named, and in the concluding part of the deed, authority was given to the mortgagee, on default of payment by the mortgagor, to sell the villages pledged, as well as "any other existing property and whatever may hereafter be acquired," a village acquired by the mortgagor after the execution of the deed, was held not to be included in the mortgage so as to defeat the claim of a purchaser at public auction in execution of a decree. The Court said that independently of the fact that the mortgagor was not possessed of the village at the date of the deed, the words were to be treated as mere surplusage, because without them all his property was equally liable to make good the mortgagee's claim should the pledged estate prove insufficient (*d*). In another case it was decided that an agreement by a debtor to discharge a debt by instalments and "not to alienate any part of his property,"—the property not being specified,—“until the debt had been paid,” did not operate as a mortgage, or vitiate the title of a *bond fide* purchaser from the debtor. But it was declared to be doubtful whether, after the debtor has committed a breach of his agreement, “the creditor is any longer bound to act on the forbearance stipulated for by the *kistbundec*, and may not at once demand payment in full of the debt due to him” (*e*).

A power of sale in a mortgage deed,—an authority to the mortgagee, on default being made by the mortgagor, to sell the mortgaged property and so repay himself without applying to the Court—cannot be safely acted upon. A mortgage deed gave the mortgagee a power of sale over the estate, in case default should be made in payment of the mortgage money on a day named; the mortgagee sold under the power: and the purchaser brought a suit against the mortgagor to obtain possession of the land sold to

(*d*) 7 N. W. P. 265.

5 B. L. R. 264 (F. B.).

(*e*) S. D. A. 1855, 353. See

him. The Court refused to recognise the validity of such a power, or to give any assistance in carrying it into effect, saying (f), "Such a condition might be perfectly consistent with the laws of a great commercial country affording every facility to the capitalist lender, but, at the same time, be quite inconsistent with the laws of a country deriving the great bulk of its revenue from the land, and as a recompense for the stringency of the rules under which it is compelled to collect its revenue in order to carry on the Government (sale of the estate being the penalty of default), affording every possible protection, in his private transactions, to the land-holding borrower. The regulations will be searched in vain, for any express enactment prohibiting the sale of a mortgaged estate under a power of sale. But such a power is repugnant to the principles of the regulations enacted by Government for regulating the transfer of immoveable property in satisfaction of debt in general, and in satisfaction of debts on mortgage in particular. The regulations do not sanction, in any case, the transfer of immoveable property in satisfaction of a debt, without the intervention of a public officer, except such transfer be by the direct and immediate act of the proprietor himself."

Such a power is therefore of no effect, as the law at present stands (g). But it may be doubted whether the dread of injustice to the mortgagor, which is the foundation of this rule, is sufficient to outweigh the manifest convenience and advantage to both parties, which arise from a sale unaccompanied by the expense and delay by which litigation is at all times attended. Moreover, except where there are strong reasons for it, interference with arrangements fairly made between individuals is undesirable. There is nothing *prima facie* inequitable in such a power: and if in fact any great oppression is worked by the mortgagee, or

(f) S. D. A. 1847, 354.

Jur. 280 (292): 15 B. L. R. 28:

(g) See *Doucett v. Wise* 2 Ind. 8 Bom. a. j. 142.



the land is sold for an evidently unfair price, the mortgagor still has his remedy through the Courts.

In England also, it was once doubted whether such powers should be upheld, and for a time the inclination and the decisions of the Courts were against them. But for a very long period, they have been uniformly supported and given effect to. A power of sale on default is given to the mortgagee in almost every English mortgage deed: and such powers are constantly acted upon, without any general complaint being heard of the evil effects produced thereby. On the contrary, they are found in practice to be very useful, and to be the means of avoiding much expense and delay: while in the event of any abuse of the privilege they confer, the mortgagor has no difficulty in obtaining relief from the Courts. The observations of a well-known writer on the subject of English mortgages, are very much to the point (*h*): "Doubts were formerly entertained of the validity of an exercise of these powers of sale, without the concurrence of the mortgagor, or the sanction of a Court of equity, but they were groundless: a slight consideration will shew that they are not within any of the mischiefs intended to be guarded against by the Courts of equity, for they give nothing to the creditor beyond his principal, interest, and costs: they bestow on him no collateral or ulterior advantage; and they only enable him with promptitude to obtain payment of his mortgage debt."

So universal has the use of these powers become under the English law, that now even if no power of sale be expressly given by the mortgage deed, the mortgagee has a statutory power of sale. By Stat. 23 and 24 Vic. c. 145 (*i*) unless the power be negatived by express declaration in the security, and subject to any variations or limitations contained in it, mortgaged real and leasehold estates may be sold by the mortgagee in the manner and under circumstances similar to those under which an ordinary power of

(*h*) Coote, p. 124.

Law of Mortgage, 3rd Ed. p. 498.

(*i*) Secs. 11—16. See Fisher's

sale vested in the mortgagee by the mortgage deed may be exercised. And to a similar effect are the provisions of Act XXVIII of 1866 (*j*): but this Act extends only to mortgages to which English law is applicable (*k*).

Since the passing of Act XXVIII of 1855 (for the repeal of the usury laws) (*l*), interest may be contracted for at any rate on which the parties choose to agree. But no agreement to pay interest at a rate higher than twelve per cent. per annum can be enforced if it was entered into prior to that Act: such an agreement cannot be enforced, as regards interest, even to the extent of the legal interest: while, if the attempt to secure more than twelve per cent. has been made in such a manner as the Court considers to be "elusive" of the law, a suit brought on the contract will be dismissed with costs, and neither principal nor interest can be recovered.

The second and third sections of Regulation 1793 provide for the rates of interest to be decreed where the cause of action arose before the 28th of March, 1780, and where it arose between that date and the 1st of January, 1793. Section 4 enacts that where the cause of action arose on or after the latter date, the Courts are not to decree any interest above the rate of twelve per cent. per annum: and Section 5, that if in any of the cases specified in the preceding sections, a lower rate of interest than any of the rates therein authorised to be awarded shall have been stipulated between the parties, no higher rate of interest than the rate so stipulated is to be decreed. Sections 6 and 7 provide that accumulated interest in excess of the principal shall not be allowed, nor compound interest, except in the cases specified. By Section 8 it is enacted that "the Courts are not to decree any interest whatever, in any case where the bond or instrument given for the security and evidence of the debt, shall have been granted on or subsequent to the 28th

(*j*) Sec. 6.

(*k*) Sec. 45.

(*l*) This Act came into force on the 19th of September, 1855.



of March 1780 and shall specify a higher rate of interest than is authorized by this Regulation to have been given and received subsequent to that date;" and Section 9 adds "nor to decree any interest whatsoever in favor of the plaintiff, in any case when the cause of action shall have arisen on or subsequent to the 28th of March 1780, when a greater interest than is authorized by this Regulation shall have been received or stipulated to be received, if it be proved that any attempt has been made to elude the rules prescribed in it, by any deduction from the loan, or by any device or means whatever, nor to give any other judgment but for dismissal of the suit, with costs to be paid by the plaintiff." The 10th Section of the Regulation provides that in all mortgages made on or after the 28th of March, 1780, whether usufructuary or not, the mortgagee shall not be entitled to recover more than twelve per cent. altogether: and that all such mortgages are to be considered as virtually and in effect cancelled and redeemed wherever the principal with the simple interest upon it (not exceeding twelve per cent.) have been realized from the usufruct or otherwise liquidated by the mortgagor.

In the case of *Shah Mukhun Lall v. Baboo Sree Kishen Sing (m)* which was before the Privy Council in 1868, those sections were much discussed. The suit was brought for a declaration that three several instruments together formed one mortgage transaction: to establish the plaintiffs' right to redeem: to cancel the instruments: and to obtain possession of the lands and payment of a small estimated surplus. In the course of the suit the further questions were raised—at what rate of interest, whether at nine per cent. (the rate fixed by the mortgage deed, one of the three instruments which, as the Court held, formed one transaction) or at a higher rate (provided by all the deeds read as one), the plaintiffs were entitled to redeem: whether the loan was at usurious interest: and whether the several instruments were a device or means within sec. 9 of Reg. XV of 1793

to conceal usury and to evade the law. The Sudder Court held (n) that the three instruments formed one mortgage security, and were a device to conceal usury : that the contract was usurious : but that, as the plaint was for redemption, the mortgage was redeemable on payment of the principal and nine per cent., the interest expressed to be payable in the mortgage deed. The Privy Council, while agreeing that the several transactions formed one mortgage and were a device to evade the usury laws within the meaning of section 9, inasmuch as though the only rate of interest expressed in the actual mortgage deed was nine per cent., the general result of the several transactions was to give the mortgagee fourteen per cent., were of opinion that the mortgagor, if allowed to redeem, must be charged with interest at twelve per cent. They held that though the mortgagee if he had come into Court as plaintiff could not have enforced his claim,—still the mortgagor, as he sued to redeem stating what the real terms of the agreement were, could not both “approve and reprobate” the transaction. “The present suit is one for redemption, not for declaring a forfeiture, and must be decided according to the rules applicable to the former suit. If the transaction were simply void and no estate at all passed, it is obvious that the remedy to recover the land would be a possessory suit against which limitation would run from the moment of entry. It cannot be treated as a voidable or redeemable estate between mortgagor and mortgagee for one purpose, *viz.* to escape the limitation law, and as a void estate for another. If the estate in the lands created by the lease can be determined before the expiration of the twenty years, that can only be effected by coming to the Court for equitable relief and submitting to the usual terms in which such relief is granted. What then are those terms? The Court will not, in the interests of justice, permit inconsistency and untruth of statement,—will not permit a plaintiff to say ‘I promised to give the defendant fourteen per cent. on his loan to me,’ and seek

(n) S. D. A. 1852, p. 678.



relief on that allegation: and permit him also the next instant to say, 'The contract is expressed for nine per cent. and I will tie my opponent down to that term: this lower rate must be deemed to have been stipulated and so to form the measure of his right to interest.' The reply to this will be: 'You have told us what the real bargain was, and on this statement have made your application for relief, which you can obtain only on equitable grounds. Their Lordships find in the Regulations no positive law forbidding the application of these principles of justice to the case. The 10th section rather leads to the contrary conclusion, *viz.* that in a case circumstanced like the present, the mortgagee may retain his pledge until he has received out of it his debt with interest at twelve per cent.'" (o).

Where, however, the mortgagee comes into Court to enforce a claim based on an agreement falling within the terms of Section 9, his suit will be dismissed. Thus in the case of *Wise v. Juggobundhoo Bose* (p) the Privy Council held that a certain bond, a lease, and an under-lease formed one entire transaction which was usurious and elusive, and fell under Section 9 of Reg. XV of 1793: and the suit to enforce the bond was consequently dismissed. Their Lordships say,—“then there comes (in Section 9) this, ‘is not to give any other judgment but for the dismissal of the suit’: and we cannot conceive that that means anything but the dismissal of the suit so far as it has relation to that usurious contract, though of course it would be different if there was one count on one transaction and another count upon another and a totally different transaction.”

In a case of *bye-bil-wufa*, the mortgagee having exacted illegal interest by deduction from the principal, his suit to have the sale made absolute was dismissed with costs, under section 9 (q). So, where there was a mortgage by conditional sale on an actual advance, and at the same

(o) 12 Moore 185, *et seq.*

4 Moore 219.

(p) 12 Moore 477 (494). See

(q) 5 Sel. Rep. 8, 79.

time, the mortgagor transferred absolutely to the mortgagee certain other land, without any consideration, but under pretence of the transfer being in payment of charges for preparing deeds, &c. (r).

A deed in which sums which had not then been paid, were stated to have been received, and an engagement was entered into to pay interest on them from the date of the deed, that is, for a time before payment of them, was held to be usurious and "elusive," and a suit founded on it was dismissed with costs (s).

In a suit to obtain possession of certain premises, under a deed of bye-bil-wufa, where the mortgage had been fore-closed and the sale had become absolute,—it appearing that twelve per cent. per annum was the rate of interest stipulated for in the deed, and that the mortgagor had granted a separate bond in which he undertook to pay one per cent. additional,—the transaction was held to be elusive of the law, and the suit was dismissed with costs (t).

It is not a fair interpretation of Section 9 of Regulation XV of 1793, to bring within its terms every contract the ultimate effect of which is to secure to the lender more than the legal interest of twelve per cent. upon money lent by him. A contract is not within the terms of that law, whatever its ultimate effect may be, provided it be on the face of it a fair and open transaction, and one in which the borrower takes the chances of the market price of an article at a particular period (u).

Lands were sold on payment of rupees 4,401, the vendee covenanting by a separate deed not to take possession until the lapse of a year and four months, at the end of which time the vendor might re-purchase on paying rupees 5,801, —otherwise the sale to be absolute. The vendor did not

(r) 5 Sel. Rep. 346.

(u) S. D. A. 1857, p. 183. See

(s) S. D. A. 1852, p. 516. See S. D. A. 1853, p. 268.

S. D. A. 1857, pp. 118, 189: 1858, pp. 457, 913, 961. But see also

(t) 4 Sel. Rep. 10. See 3 N. W. P. 411.

S. D. A. 1855, p. 452.



repurchase, and the lender sued for possession as on an absolute purchase. But the transaction was held to be a bye-bil-wufa with a stipulation for the payment of illegal interest, and to be evasive of the law. Under the special circumstances of the case, however, the principal was not declared forfeited, but only the interest (*v*).

It must be clear that there was a design to evade the law : otherwise the penalty of dismissal with costs (involving the loss of the principal as well as the interest) cannot be imposed (*w*).

If in drawing up a bond payable by instalments, the interest accruing during the currency of the bond is provided for by adding a certain sum to the original debt and taking a bond for the whole sum, this is not an infraction of the usury laws, so long as the additional sum stipulated for as interest, does not exceed the limit prescribed by law (*x*).

A mortgagee, who was a Mahomedan and wished to avoid the appearance of taking interest, actually advanced only rupees 1,300. But consolidating the legal interest of that sum for five years (rupees 781), the period during which the mortgage was made redeemable, he took a mortgage bond for the aggregate sum of rupees 2,081. It was held that he was entitled to recover the sum actually advanced, with interest at the rate of twelve per cent. per annum, as there was no attempt or intention in fact to get more than legal interest (*y*).

In an agreement mortgaging land the rents of which amounted to about rupees 2,500, it was stipulated that out of these rents, the mortgagee should pay himself interest at ten per cent., with ten per cent. as expenses of collection, and should discharge certain public burdens, devoting the

(*v*) 2 Sel. Rep. 146.

p. 849.

(*w*) 10 N. W. P. 43, 276. 5 Sel.

(*x*) 9 N. W. P. 487.

Rep. 10 : 2 Sel. Rep. 146, S. D.

(*y*) 2 Sel. Rep. 255. See S. D.

A. 1847, p. 459 : 1852, p. 1132 :

A. 1852, p. 577.

1853, p. 893 : 1855, p. 336 : 1857,

surplus to the reduction of the principal,—and that if the rents fell short of rupees 2,500 a year, the mortgagors should make them up to that sum. This was held to be a good agreement, and not usurious; and the rents falling short of rupees 2,500 a year, the mortgagee recovered the deficiency from the mortgagor (z).

Under the old law, a condition in a mortgage deed (the mortgage being of an usufructuary nature) that the mortgagor shall not demand a settlement of accounts when redeeming, will be disregarded, and the general rule as to the redemption of mortgages of the nature of the one in suit, will be acted upon (a). And in like manner, an agreement that the mortgagor shall have no right to claim an account of the proceeds of the estate during the occupancy of the mortgagee, cannot (and no similar special condition between the parties can) bar the operation of the law by which the lender “is to account to the borrower for the proceeds during his possession” (b).

In the case of *Hunoomanpersad Panday* (c) to which there has been occasion to refer so frequently, the mortgagee was put in possession under a lease at a fixed rent, and claimed not to be liable to account for the sums received by him; but the Privy Council ruled that the lease was merely part of the mortgage security and was intended to create not a distinct estate, but only a security for the mortgage money. “As it was not meant that the principal should be risked, it was virtually a provision to exclude an account of the rents and profits, and the decree of the Sudder Dewanny Adawlut, directing an account of the actual rents and profits, therefore proceeds on the right principle and is in accordance with the true nature of the security and the spirit of the Regulations:”—and their Lordships added that, under the Regulations, unless the principal is meant to be risked, and is put in risk, the estate

(z) S. D. A. 1848, p. 872.

W. P. 456. 1 Sel. Rep. 119.

(a) 7 N. W. P. 307.

(c) 6 Moore 393. See S. D. A.

(b) S. D. A. 1851, p. 632 : 5 N.

1849, p. 134 : 1857, p. 1232.



created as part of a mortgage security, whatever be its form or duration, can be received only as a security for the mortgage debt, and must be restored when the debt, interest, and costs are satisfied by receipts.

In contracts made after Act XXVIII of 1855 came into force (*d*) conditions that the mortgagee shall not be called on to account are legal. Section 2 of that Act provides that in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties; and if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable. By Section 4, a mortgage or other contract for the loan of money by which it is agreed that the use or usufruct of any property shall be allowed in lien of interest, shall be binding upon the parties. And by Section 6, in adjusting accounts between a mortgagor and mortgagee (under a mortgage made subsequent to the 19th of September 1855) interest shall be calculated at the rate contracted for, or if no rate has been stipulated, and interest is payable under the contract, then at such rate as the Court deems reasonable.

It is not uncommon to find a condition that the rate of interest shall be increased on default being made in regular payment, or the like. In such cases, the question arises whether the interest at the higher rate is to be treated as liquidated damages, *i. e.* as a sum to be paid in any event by the person making default,—or merely as a penalty.

The Act of 1855 does not affect the question of penalty or no penalty, and does not prevent the Courts from deciding whether the condition was or was not intended merely as a penalty (*e*). The question does not turn upon any particular word that may be used. The parties to an instrument cannot change the facts by using a particular name. And whether the sum agreed to be paid is to be treated as a penalty or as liquidated damages

(*d*) 19th Sept. 1855.

(*e*) 19 W. R. 271, 11 B. L. R. 135.

is a question of law to be decided by the Court on a consideration of the whole instrument in each case. The mere use of the term "penalty," or the term "liquidated damages," or the term "interest," does not determine the intention. But like any other question of construction, the intention is to be determined from the whole instrument (*f*).

Where there was a mortgage, the principal debt to be repaid in three years, and interest to be paid at the rate of eight annas per cent. per mensem (six per cent. per annum), and the mortgagor agreed, "should I fail to pay the principal and interest as agreed upon I shall pay interest at four per cent. per month (forty-eight per cent. per annum) from the date of this bond to that of liquidation,"—on default being made at the end of the three years, it was held that the agreement for interest at the higher rate, was in the nature of a penalty and not liquidated damages. And the Court gave the mortgagee a decree for interest at the rate of twelve per cent. only, from the date of the mortgage (*g*).

But all turns on the circumstances of each particular case. Thus where a bond stipulated for a higher rate of interest in the event of default in payment,—providing not an unvarying lump sum but a sum increasing with the term during which the lender was kept out of his money—this was under the circumstances held not to be a penalty, being an appropriate measure of the compensation to be paid to the lender for being deprived of his money (*h*).

In another case, *A* borrowed Rs. 20,000 and agreed that, by way of security for the repayment of it with interest at eighteen per cent., he would give an ijara of certain property, and that if he failed to give the ijara he would repay the amount borrowed with interest at the rate of seventy-five per cent. *A* failed to grant the ijara, and was sued by the mortgagee. And the Court held that the seventy-five per cent.

(*f*) *Id.* p^{tr} Pontifex, *J.*

R. 474: 4 B. L. R. ap. 92.

(*g*) 19 W. R. 271, 11 B. L. R.

(*h*) 22 W. R. 223.

135. So 20 W. R. 257: 22 W.



was not intended as a penalty merely, but as an estimate of damages for the breach of contract. "The breach which is provided for in this way is a single act, namely, the not giving the ijara. The reasons which exist in the cases where a sum is agreed to be paid on the non-performance of any one of different acts with different consequences to the party who is entitled to have them performed, for saying that it is a penalty, do not apply to the present case. We have to see what was the intention of the parties independently of any such rule of construction. The value of the security, the advantage which the plaintiff would derive from it, was not capable of precise estimation. It was quite natural that the parties should agree to an estimate of it. And they did so" (i).

If the terms of a mortgage or other contract are utterly unconscionable it may be that the Courts, on equitable principles, will not enforce them (j).

There are a good many reported cases in which agreements to advance funds required for litigation at a high interest, on the security of a large share of the ultimate profits of the litigation, have been contested on the ground of their being unconscionable and against public policy. In such cases all depends upon the particular character of the transaction. Although the specific English law of maintenance and champerty has not been introduced into India, it seems clear upon the authorities that contracts of this character will under certain circumstances be held to be invalid, as being against public policy. A fair agreement to supply funds to carry on a suit in consideration of having a share of the property if recovered, ought not to be regarded as being *per se* opposed to public policy. Cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and, no means except the property itself, should be assisted in this manner. But agreements of this

(i) 21 W. R. 352 (on appeal 20 W. R. 317), 12 B. L. R. 451.
from a judgment of Markby, J. in (j) 23 W. R. 49.



Kind will be carefully watched: and when found to be extortionate and unconscionable so as to be inequitable,—or to be made not with the *bona fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by encouraging and abetting unrighteous suits, so as to be contrary to public policy,—effect ought not be given to them (k).

It not unfrequently happens, that one who has lent money on mortgage, subsequently makes further advances to the mortgagor, it being agreed that the property mortgaged shall be charged with the re-payment of these further advances (l). In such cases, the land will be considered as mortgaged for the aggregate amount of the original and subsequent loans. It is, however, only when it is expressly agreed that the subsequent loan shall be a further charge upon the land, that it will be treated as such (m).

If loans are made by way of further charge, and questions as to priority arise, the mortgage will, no doubt, as to each particular sum, be considered to bear date only from the time when that sum was charged on the mortgaged lands, and will not, as to the subsequent advances, take the date of the original mortgage contract (n). But there are very few reported cases in which such questions of priority have been really discussed or decided.

The further charge ought to be made by a new deed applicable only to the sum to be charged: and when the original mortgage deed is thrown aside, and a fresh deed executed, by which the property is mortgaged for the consolidated sum, there is danger of the original mortgage as

(k) See the judgment of the Privy Council, dated 25th November, 1876, in the case of *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (not yet reported). See also *Fischer v. Kamala Naicker*, 8 Moore 170, and *Chedambura Chetty's case*, 1 L. R. I. A. 241 (265).
(l) 7 N. W. P. 34, 248, 607: 8 N. W. P. 112, 692, 726.
(m) 9 N. W. P. 465: N. W. P. 1860, p. 122.
(n) 25 W. R. 171. See also 18 W. R. 280.



well as the further charge being held to rank only from the date of the later deed. Where the question is whether the mortgagee's first security was extinguished by his taking a second security covering the original debt and accumulated interest,—the answer will depend mainly upon the intention of the parties. And in one case the Court thought the intention was clearly shewn by the original bond having remained in the possession of the mortgagee (o).

There is a case in which (p) the Lower Court's judgment contained the following passage: "The mortgagor Chujjoo Mull (defendant) urges, that the property was in his possession long before plaintiff's mortgage. But all former deeds by which he held, are annulled by the last one, under which he holds possession at present. If this were not the case, there was no use in writing a new deed: as this deed is clearly of a subsequent date to that of plaintiff's, it follows that plaintiff holds a prior lien on the property." On this the Agra Sudder Court remarks: "The Court are unanimous in recording their dissent from the doctrine propounded in the foregoing extract. They observe that the 'former deeds' held by the appellant Chujjoo Mull, are by no means 'annulled by the last one, under which he holds possession at present.' They are, it is true, *superseded* by the latter deed; but up to the time of the latter instrument's execution, the previous deeds, if genuine, must be held to be in full force. The Judge's remark that 'if this were not the case, there was no use in writing a new deed,' is founded on an erroneous view of the case. There was an *obvious* use in the new deed, as it included fresh demands of Chujjoo Mull against the subscribing parties for which the former deeds provided no security; and the amount specified in the new bond, represented the consolidated sum due to the bond-holder up to that date, and *repledged* the property, which had been theretofore hypothecated for a smaller sum. Equally unsound is the Judge's declaration

(o) 23 W. R. 338.

W. P. 465.

(p) 7 N. W. P. 34. See 9 N.



‘that as this deed is clearly of a subsequent date to the plaintiff’s, it follows that the plaintiff holds a prior lien on the property.’ If this doctrine were admitted, a wide door would be opened to fraud; a dishonest debtor, simply by ante-dating a bond, might invalidate a genuine deed of later date. The question for decision in the present case is, not the order of dates in the conflicting deeds, but whether the owners of the property in dispute were competent to execute the bond which constitutes the plaintiff’s cause of action, which they clearly were *not* if the authenticity of Chujjoo Mull’s deeds of the 8th October 1824, and 17th April 1833, be admitted,”—which deeds, or one of them, must apparently have contained a proviso against alienation by the mortgagor until the debt was paid off.

A mortgagor having made some payments, the accounts between him and the mortgagee were made up, and a fresh mortgage deed executed which, after reciting the previous mortgage and the payments in respect of it, again mortgaged the same property on the same terms as those contained in the original mortgage deed, as a security for the unliquidated balance. The original mortgage deed was then given up and cancelled. The mortgagor had mortgaged the same property to a third party subsequent to the date of the original mortgage, but prior to the mortgage given as security for the balance. The Court considered that this latter mortgage was merely a *continuation* of the first mortgage, and that the substitution of the last deed for the first did not terminate the first mortgage, or give priority to the third party to whom the property had been intermediately mortgaged (*q*).

When a person admits having executed a written instrument which contains a recital that the consideration has been received, but seeks to avoid liability by pleading that full consideration according to the terms of the contract has not been received by him, the proof of such non-receipt



rests upon *him*, and in the absence of proof he must be held to the terms of the document to which he has affixed his signature. The written instrument is *prima facie* evidence that the consideration has been received as recited, but it is not conclusive; and this *prima facie* evidence may be rebutted (*r*).

Where an instrument has been deliberately executed and has been acted on for many years, every presumption is to be made in favor of the statements made in it (*s*).

In a case where a recital of payment of consideration was made with a fraudulent object, the Court refused to allow oral evidence to be given to prove that no consideration had in fact been paid (*t*).

- (*r*) *Janeswar Dass v. Mahabeer Sing* 3 L. R. I. A. 1; *Ramturun Sing v. Must. Pran Peary*, 13 Moore 551; *Kalepersad Tewaree v. Raja Sahib Perhlad Sing*, 12 Moore 314, 2 B. L. R. P. C. 111; *Chowdry Deby Persad v. Chowdry Dowlut Sing*, 3 Moore 346, 6 W. R. P. C. 55; 4 B. L. R., F. B. 54; 7 W. R. p. 441.
- (*s*) *Janeswar Dass's case* and *Kalepersad Tewaree's case*, *ubi supra*.
- (*t*) 7 W. R. 334.



CHAPTER V.

OF THE REGISTRATION OF DOCUMENTS.

No particular ceremony is required on the execution of an instrument of mortgage: but it is desirable that it should be executed in the presence of at least two credible witnesses. A deed is not necessarily void simply because some of those who are named as parties to it do not sign it. In such a case the deed will, so far as circumstances admit, be binding on those who execute it, but it will not affect those who do not (a).

Delivery of the document which evidences the transfer of property is not a necessary condition to the perfectness of the conveyance; but, generally speaking, delivery evidences the completeness of the transaction, and non-delivery will operate very powerfully against the recognition of any claim founded upon the deed (b).

In a case of the sale of land, it has been held that the right of *property* passed to the purchaser on the execution and delivery of the document of conveyance, and payment by him of part of the purchase money, but that the right of *possession* remained in the vendor until the residue of the purchase money was paid (c).

It is generally to the advantage of all parties concerned, especially of mortgagees, to give as much publicity as possible to all contracts regarding land: and they ought to be brought forward on any occasion on which the rights of parties in the pledged land are under discussion,—as for

(a) 11 N. W. P. 72.

W. P. 364.

(b) 4 N. W. P. 219; see 5 N.

(c) S. D. A. 1860, p. 419.



example, when a settlement is going on. If people will not avail themselves of the simple means afforded of giving publicity to these transactions regarding land, they have only themselves to blame if the reality of the transactions is doubted when they are, after a lengthened interval, for the first time declared to have taken place (*d*).

Registration must be considered with reference to the old law and to the new. Under the old law, the registration of documents was voluntary. Under the new law it is practically compulsory; and it is impossible for intending mortgagees to be too particular or careful as to the registration of their documents. Their whole security depends upon registration, and it ought always to be insisted upon and carried out with the utmost strictness and at the earliest possible moment.

The present system of registration may be said to have been initiated in 1864. In that year was passed the first of the new Registration Acts XVI of 1864, subsequently amended by IX of 1865. The next Act was XX of 1866, which repealed XVI of 1864 and IX of 1865 and declared (Sec. 3) that "all things duly done under the same Acts or either of them shall be considered as having been done under this Act." Act XX of 1866 came into force on the 1st of May 1866: and was in substance similar to (though differing in certain important respects from) the Acts which it repealed. Act VIII of 1871 came into force on the 1st of July 1871. It repealed Act XX of 1866, of which in truth it was merely an improved edition with certain alterations which it is unnecessary to specify here.

Act VIII of 1871 has itself been repealed by Act III of 1877, which is the law now in force and is little more than a re-enactment of the Act which it repeals.

The registration of all instruments of mortgage, in which the property mortgaged is of the value of one hundred rupees

(*d*) 5 N. W. P. 333: 8 N. W. 218. See *Brajnath Koondoo Chowdry's case*, 14 Moore 144 [151].
P. 542, 601. S. D. A. 1855, p.



or upwards, executed on or after the first of January 1865, is compulsory. So also is the registration of all instruments which acknowledge the receipt or payment of any consideration for a mortgage,—and of leases of immoveable property from year to year or for any term exceeding one year, or reserving a yearly rent (*e*). If the property be less than one hundred rupees in value, registration is optional (*f*). Under Act III of 1877, whether the registration is compulsory or is optional, the instrument must be presented to the Registrar for registration within four months from the date of execution (*g*). But if owing to urgent necessity or unavoidable accident any document executed in British India is not presented for registration till after the expiration of the four months, the Registrar in cases where the delay in presentation does not exceed four months may direct the document to be accepted for registration, on payment of a fine not exceeding ten times the amount of the proper registration fee (*h*). But a document purporting to have been executed by any of the parties to it out of British India, may be registered after the usual period, if the registering officer is satisfied that the instrument was so executed, and that it has been presented for registration within four months after its arrival in British India (*i*). And not only must the document ordinarily be presented within four months, but (*j*) the persons executing the document, or their duly authorised agents or representatives, must also appear within the four months before the registering officer. If however, owing to urgent necessity or unavoidable accident, all such persons do not appear within the four months, the Registrar—if the delay does not exceed four months,—may direct that on payment of a fee not exceeding ten times the proper registration fee, the document may be registered (*k*).

(*e*) Act III of 1877, sec. 17.

(*i*) Sec. 25.

(*f*) Sec. 18.

(*j*) Secs. 32, 34.

(*g*) Sec. 23.

(*k*) *Ib.*

(*h*) Sec. 21.



When a registration office is closed on the last day of the period within which an instrument ought ordinarily to be presented for registration, the presentation will be deemed within time if made on the day on which the office re-opens (*l*).

A registered document operates from the time from which it would have commenced to operate if no registration were required or made, and not from the time of its registration (*m*).

All documents not testamentary, duly registered and relating to any property whether moveable or immoveable, take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession (*n*).

No document the registration of which is compulsory, affects any immoveable property comprised in it, or can be received as evidence of any transaction affecting such property, unless it has been duly registered (*o*).

Every instrument of mortgage, assignment, reconveyance or relinquishment, and every instrument which acknowledges the receipt or payment of any consideration on account of a mortgage, assignment, reconveyance or relinquishment,—whether the registration of it is compulsory or is optional,—shall, if duly registered, take effect as regards the property comprised therein against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not (*p*). And in cases where the earlier Acts were in force in the place and at the time in and at which the unregistered document was executed, “unregistered” means not registered under such Acts,—and where executed after the first of July 1871 means not registered under Act VIII of 1871 or the present law (*q*).

(*l*) Sec. 26.

(*m*) Sec. 47.

(*n*) Sec. 49.

(*o*) Sec. 18.

(*p*) Sec. 50. See Sec. 48.

(*q*) Sec. 50.

A document must ordinarily be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which it relates is situate (*r*).

If a person presenting a document for registration desires the appearance of any person (whether an executant or a witness) whose presence or testimony is necessary for the registration of the document, he can through the registering office take means to enforce the appearance of such person (*s*). And it is usually desirable that if there is any delay on the part of executants in completing the registration, proceedings to enforce their attendance &c., should be taken promptly, as the position of the person who claims under the document and seeks registration is always one of great difficulty and risk, to say the least of it, after the four months have expired (*t*).

The Registrar acts without authority if he registers a document which has not been presented for registration within the period prescribed by law (*u*). It is not a mere defect of procedure. And registration can be insisted on only when a document has been presented within the prescribed time and the requirements of the law for the time being in force have been complied with on the part of the person seeking registration, so as to entitle the document to registration (*v*). But the acts and formalities which accompany and constitute the act of registration are matters of procedure,—and the law declares that nothing done in good faith pursuant to the Registration Acts by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure (*w*).

Among other particulars which are to be endorsed by the Registrar upon every document admitted to registration (*x*),

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| (<i>r</i>) Act III of 1877, sec. 28. | And see 7 W. R. 112, 150. |
| (<i>s</i>) Secs. 36-39. | (<i>w</i>) Act III of 1877, sec. 87. |
| (<i>t</i>) See 11 B. L. R. 20, | (<i>x</i>) Act III of 1877, sec. 58, cl. e, |
| (<i>u</i>) See Part IV of Act III of 1877, and 10 Bom. 98. | —which is similar to Act VIII of 1871, sec. 58, cl. 3, and XX of 1866, sec. 66, cl. 3. |
| (<i>v</i>) Act III of 1877, secs. 74, 76. | |



are the following—"any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration in whole or in part made in his presence in reference to such execution." And the registering officer's certificate indorsed on the document is (y) admissible for the purpose of proving not only that the document has been duly registered but that the facts mentioned in the endorsement (*i. e.* as to payment of money, acknowledgment of receipt of consideration and the like) occurred as therein mentioned. So that if the parties choose to avail themselves of the provisions of the law, they may at the same time that they register their deeds, secure the means of being able to give satisfactory proof of the consideration. But admissions of receipt of consideration are not among the particulars which the Registrar was directed by Act XVI of 1864, sec. 36, to endorse (z).

Where a complete title as mortgagee was acquired, with possession, before the passing of Act XVI of 1864, the mortgage, though unregistered, is good as against a subsequent mortgage or sale executed and registered under one of the later Acts (a). So, where *A* purchased lands in 1866 and duly registered his bill of sale,—but *B* had purchased the same lands in 1855 from the persons through whom *A*'s vendors made title, and had been in possession ever since, without having registered his deed of sale,—and *A* sued for possession, the Court held that *B* was not bound to register and that his title was good (b). And the same rule has been laid down where both the titles arose after Act XX of 1866 came into force—the prior title unregistered but accompanied by possession being supported as against the subsequent title registered but not accompanied by possession (c). But it would be otherwise, if the first mortgagee or purchaser had

(y) Sec. 60.

(b) 1 B. L. R. a. j. 14.

(z) See 1 Agra 160.

(c) 3 B. L. R. a. j. 312. 5 B. L.

(a) 22 W. R. 3.

R. ap. 86. 9 Bom. 147.



never had possession, and the later purchaser or mortgagee (whose deed was registered) got possession. Thus where *A* mortgaged land in 1859 to *B*, but the mortgage deed was not registered, and *A* in 1867 sold the same property to *C* the deed of sale to whom was duly registered, and *C* held possession from the date of his purchase, it was held that *C* having registered his deed of sale and being in possession, his title was good as against *B* who never had possession (*d*). So where the prior unregistered claimant once had possession but was dispossessed by the subsequent registered purchaser,—a suit by the former for possession, on declaration of the superiority of his title, was dismissed (*e*).

Where a decree has been made, declaring the validity of a mortgage and directing a sale of the mortgaged property, the judgment-debtor cannot resist the issue of execution on the ground that the mortgage deed on which the decree is based was not registered as required by law (*f*).

Where a document is executed by a person on behalf of himself and of another whose agent he professes to be, it is sufficient if the person actually executing appear before the registering officer. The appearance of the other, for whom he executed, is not necessary (*g*). The person actually executing the deed, or *his* representative, assign, or agent duly authorised, must appear before the Registrar. When a man executes a document as agent for another, he or *his* representative &c., must appear before the Registrar; and it is not necessary that the person by whose agent the document purports to have been executed, or the representative of such person, should appear (*h*).

An unregistered bond, though immoveable property be made by the terms of it a collateral security, is admissible in evidence in a suit to enforce the personal liability of the party who executed it. It is only excluded where it is offered as evidence of a transaction affecting immoveable

(*d*) 10 B. L. R. 380. And see 1857, p. 147.
Mofuzel Hossein's case *ib.* 381 n. (*g*) 22 W. R. 68.
(*e*) 21 W. R. 421. (*h*) 16 W. R. 180.
(*f*) 22 W. R. 354. See S. D. A.



property (i). There can be no doubt as to this now, looking to the language of the Acts of 1871 and 1877 (Section 49). But the language of the earlier Acts left the question open to doubt. The Calcutta Court, however, held that under these Acts also the inadmissibility was confined to cases in which the object was to use the document for the purpose of affecting immoveable property (j).

A document which is a receipt for a portion of the consideration money for the sale of immoveable property, must be registered,—and if not registered cannot be received in evidence (k). And the law was the same under Act XX of 1866 (l).

In consideration of a certain sum paid to the lessor, a moursussee pottah was granted, subject to a condition that if the amount were repaid by a day named, the lessee would surrender the lease and put the lessor in possession again. A question having subsequently arisen as to whether the lessor had repaid the money and been restored to possession, he pleaded that he had repaid it and that thereupon the lessee gave him a receipt and executed an *istifanama* or instrument of surrender,—surrendering the property to him again. This *istifanama* was not registered. It was on that ground held to be inadmissible in evidence, the Court being of opinion that it was an instrument which purported or operated to create, declare, limit or extinguish a right, title or interest to or in immoveable property (m). But in a later case (n), where the mortgage deed contained an acknowledgment by the mortgagor that he had received Rs. 18000 (the consideration for the mortgage), and the mortgagee, simultaneously with the execution of the mortgage deed, gave the mortgagor a receipt acknowledging repayment of Rs. 7000 part of the Rs. 18000,—it was held

(i) 7 Mad. 296 : 25 W. R. 78, See 22 W. R. 305.
348.

(j) 4 B. L. R. F. B. 18 : 10 W. case 14 Moore 129.

R. 252.

(k) Acts of 1871 and 1877 sec. 17.

(l) Sec. 17. *Futteh Chund Sahoo's*

(m) 16 W. R. 56.

(n) 20 W. R. 334.

that the receipt for the payment of Rs. 7000 did not require registration and that it did not fall under either clause 2 or clause 3 of Sec. 17 of Act XX of 1866, although it in fact reduced the charge on the land considerably. There can be no doubt however that prudence requires that all such instruments should be registered.

In a suit instituted after Act VIII of 1871 came into force, and which came before the Calcutta Court exercising its original jurisdiction, it appeared that the defendant on the 29th of March 1871, in Calcutta, deposited with the plaintiff the title-deeds of certain immoveable property in Calcutta as security for the repayment of Rs. 1200 lent to him by the plaintiff at the time the deposit was made. Some hours afterwards, the defendant by way of further security gave the plaintiff a promissory note for the amount of the loan and endorsed on it the following memorandum,—“For the repayment of Rs. 1200 and the interest due thereon of the within note of hand, I hereby deposit with the plaintiff as a collateral security by way of equitable mortgage, title-deeds of my property, &c.” The Court held that there was a good equitable mortgage though this memorandum was not registered,—because the equitable mortgage was complete without the memorandum, which was not a writing which the parties had made as the evidence of their contract but only a writing which was evidence of the fact from which the contract was to be inferred (o). But this case turned entirely on the special facts proved,—on the fact that there was a good equitable mortgage on the money being advanced and the title-deeds deposited, quite independently of any subsequent writing. And as a rule there can be no doubt that, save under very exceptional circumstances, an equitable mortgage (if of the value of Rs. 100 or upwards) should invariably be registered.

Where the title-deeds were sent to the plaintiff accompanied by a letter from the defendant stating that they were handed over “as a collateral security for the



Rs. 20,000 which fall due this day,"—and the letter was not registered,—it was held that registration was necessary. *Phear J.* said, "I cannot separate these letters from the transaction of the deposit of the title-deeds. It explains why the deeds are deposited, and states that the deposit is made as a collateral security for Rs. 20,000. This is not a case in which the charge on land is implied from the deposit of the deeds themselves: neither is it a case where the charge or equitable mortgage is made expressly by parol" (*p*). This case was one falling under Act XX of 1866,—which however in no respect differs, as to this matter, from the more recent Acts.

In another case the question was whether a certain memorandum was admissible without registration. It referred to a promissory note for Rs. 20,000, and said, "for the above promissory note, the grant of the dockyard and office to be deposited in three days and a proper agreement made out. The time of credit to be one year or eighteen months." The Court held that this was not an actual mortgage of the dockyard or office, nor did it amount to a conveyance: that it was merely an agreement (of which specific performance might be enforced) to deposit the deeds and to execute a proper agreement: and that it was not a document purporting to create any right, title or interest whether vested or contingent in immoveable property, within the meaning of cl. 2, Sec. 17, Act XX of 1866 (*q*).

So where a person borrowing money gave the lender an *ikrar* by which he agreed to execute a conveyance of certain lands,—it was held that the document (which was executed when Act XVI of 1864 was in force) was one the registration of which was optional, and that it was admissible in evidence in a suit for specific performance of the agreement to convey (*r*). And an agreement for a lease, in which it was agreed that on a deed being prepared by an attorney the parties would execute it, was in a suit

(*p*) 7 B. L. R. 55.

(*r*) 15 W. R. 354.

(*q*) 3 B. L. R. 126.



for specific performance of the agreement to execute a lease, held not to require registration (*s*).

The Registrar cannot refuse to register a deed on the ground that the full consideration therein mentioned has not been paid. His duty is, when the parties appear before him, simply to ascertain whether the deed has been executed by the persons by whom it purports to have been executed (*t*). When the executants appear and admit execution, the Registrar has nothing to do with the recitals in the deed, or the possible operation of the deed as regards third parties: and it is his plain duty to register the document, whether the executant asks or consents to it or not (*u*). The registration of a document under Act XX of 1866 is complete when all the requirements of Sections 66—69 have been fulfilled: and the certificate mentioned in Sec. 68 is *prima facie* evidence of its completeness. And where a kubala or deed of sale bore such a certificate, a memorandum indorsed by the Registrar to the effect that he was not satisfied that the heirship of the party conveying had been established, was held in no way to affect the registration (*v*).

The provisions of the later Acts are substantially similar (*w*). But whereas under the older law the Registrar's "certificate" is "*prima facie* evidence that the document has been duly registered &c." under the two later Acts, (*x*) it is merely "admissible for the purpose of proving that the document has been duly registered &c."

An instrument of sale was executed on the 9th of August 1866, and was shortly afterwards accidentally destroyed by fire,—all save a charred fragment, of which, on account of the damage which the document had received, registration was refused when it was (within the prescribed time) presented for registration. A suit was then brought to compel

(*s*) 3 B. L. R. *ap.* 1.

(*t*) 1 B. L. R. o. j. 47.

(*u*) 12 W. R. 500; 16 W. R.

180. *Mejo Mollo's case*, 12 B. L. R.

492 n.

(*v*) Sec. 60.

(*w*) 22 W. R. 319. See 6 W. R. Misc. 131.

(*x*) Act III of 1877, sec. 60, &c.



the vendor to execute a fresh instrument of sale: and the question arose whether secondary evidence of the contents of the burnt document was admissible. The Madras Court held that it was, observing,—“An instrument liable to registration under Section 17 and which through neglect had not been presented for registration within the time allowed, would clearly, after such time had elapsed, be inadmissible, and consequently if lost or destroyed subsequently it could not be proved by secondary evidence. But in the present case the accident to the instrument rendered it, through no default of the plaintiff, incapable of registration within the time allowed by Section 22, and thus prevented the plaintiff registering it in accordance with the provisions of the Act. There never had been the omission in respect to the registering of the instrument, to which the section, in our view of its construction, attaches the prohibition, and consequently it had not become an inadmissible instrument within the meaning of the section” (*y*).

The Acts of 1866 and 1864 contained provisions (which are omitted from the later Acts) for the “special” registration of obligations for the payment of money. The general effect of these provisions may be stated to be that when the parties at the time of registering agreed, and got the Registrar to record the agreement, that the amount secured might be recovered in a summary way, the obligee could at any time within one year from the date on which the amount became payable apply by petition to a Civil Court having jurisdiction,—and thereupon on production of the obligation and of the Registrar’s record of the agreement that the obligation might be enforced summarily, was entitled to a decree for the amount due and claimed, with interest at the rate specified (if any) to the date of the decree.

It is not necessary to enter here into the details of the law as to “special” registration and summary proceedings taken thereon. It is enough to indicate their bearing on



questions connected with mortgages created by such instruments.

The Court in giving a decree, under a bond specially registered cannot vary the terms of the agreement between the parties, or give any decree whatever other than that which it is by the strict words of the law authorised to give. Thus where the obligation was for the payment of a certain sum on a day named, the Court could not give a decree ordering payment by instalments (z).

In like manner, under a "specially" registered bond purporting to mortgage land as a security for the repayment of money, only a money decree can (under Section 53 of Act XX of 1866) be passed: and the Court has no power to declare that the debt is a charge on the land (a).

But according to recent decisions of the Calcutta Court, it practically is of little consequence to the mortgagee, so far as the mortgagor or obligor is concerned, whether in such a case he has got a decree formally declaring his charge on the land,—if he has a money decree under which he attaches and sells the mortgaged property. At a sale under such a decree the whole title passes, as against the mortgagor, just as much as if the decree declared the charge on the land to be good. For it has been held that the taking a mere money decree on a specially registered mortgage bond, under Section 53 of Act XX of 1866, does not extinguish the mortgagee's lien on the mortgaged property: that a proceeding under that section is a suit of a civil nature within the meaning of Section 2 of Act VIII of 1859, independently of any peculiarity in the special procedure to be adopted: and that therefore a creditor who has resorted to the summary procedure under Act XX of 1866 and has recovered a portion of his claim in execution of the decree so obtained, cannot bring a regular suit against the same parties for the enforcement of his remedies under the bond against immoveable property. In the judgment of the majority of the Full Bench Court by which this case was decided, it is said,—“A decree

(z) 5 B. L. R. 167.

(a) 19 W. R. 251; 22 W. R. 28.



under Section 53 is at least equivalent to a money decree in an ordinary suit : and on examination it seems to us that there is no substantial difference between the effect of an ordinary money decree on a mortgage bond and a decree on the same bond for recovery of the money due by sale of the mortgaged property. So that, whether a decree for the money be made under Section 53 or in a regular suit, the remedy of the mortgagee is the same. When a creditor under a bond by which property is mortgaged takes a money decree and proceeds to attach and sell the mortgaged property, he thereby transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor : and if there be no third party interested in the property, it becomes vested absolutely in the purchaser" (b).

The Allahabad Court, however, dissents from this view of the law, and holds that nothing passes to the purchaser at a sale in execution of a money decree but the right, title and interest of the judgment-debtor at the time of the sale (c).

The old law of registration, Act XIX of 1843, was in force from the 1st of May 1843 to the end of 1864.

Under it, the fact of a deed not being registered has been deemed to create a presumption against its genuineness, other things being suspicious (d) : while on the other hand, it has been said that a deed which has been registered and publicly made known at the time of execution will not be set aside except on strong grounds (e). And registration effected in a district other than that in which the lands to which the deed referred were situated cast suspicion on the transaction (f).

A registered deed of mortgage was entitled to satisfaction in preference to any other mortgage of the same pro-

(b) 14 B. L. R. 408, 421 (F. B.). p. 218. 10 N. W. P. 290, 608.

See 9 B. L. R. 180.

(c) 9 N. W. P. 481. S. D. A.

(c) 1 I. L. R. All. 240. See as
to this *post*, chap. ix.

1856, p. 615 : 1857, pp. 208, 956.

(f) N. W. P. 149. See S. D.

(d) S. D. A. 1854, p. 529 : 1855, A. 1859, p. 1059.



perty, whether of prior or subsequent date, which was not registered. And the fact of the person who obtained priority of registration of his deed, having at the time of registering, full notice or being aware of the existence of an earlier but unregistered deed, did not prevent his deed from having the preference (g).

Act XIX of 1843 gave preference to registered over unregistered deeds, only when the deeds were of the same character; and therefore, a registered deed of sale did not take priority over an unregistered mortgage deed of earlier date,—nor *vice versa*. And a subsequent purchaser whose deed was registered, took the property subject to a prior mortgage though not registered (h).

Where the plaintiff claimed to have a lien under an unregistered bond, upon lands held by the defendant who was the purchaser in possession under a deed of sale later in date than the bond, but duly registered, it was contended that the purchaser was a *bonâ fide* purchaser without notice, and therefore entitled to priority. Peacock C. J. said (i): "If the bond was really and *bonâ fide* executed before the date of the defendant's purchase, it would *primâ facie* be entitled to priority, and the defendant could not, according to the decision in the case of *Varden Seth Sam*, succeed without proof that he was a *bonâ fide* purchaser for value without notice. But even if the defendant was to satisfy the Court upon that point, he could not, in my opinion, be entitled to priority, unless the plaintiff was bound to give notice of the bond. If he was not bound to register it, in order to retain priority over subsequent purchasers for value,

(g) 1 B. L. R. a. j. 197. 16 W. R. 271. *Sreenath Bhattacharjee v. Ram-comul Gangooly*, 10 Moore 220, Suth. P. C. p. 600. 6 N. W. P. 266. S. D. A. 1853, p. 335. 3 Mad. 89.

(h) 5 W. R. 61 (F. B.): 1 B. L. R. a. j. 197: *Varden Seth Sam*

v. Luckpathy Royjee Lallah 9 Moore 303, Marsh. 461. S. D. A. 1852, p. 987: 1850, p. 77: 1857, p. 1667. 7 N. W. P. 124: 1860, p. 93. W. R. 1864, p. 141.

(i) 5 W. R. 63 (F. B.) See 1 B. L. R. a. j. 197.



I do not see what notice he could give or was bound to give * * * * If the defendant should prove that he was a *bond fide* purchaser for value, he would throw the *onus* on the plaintiff of proving that he actually advanced the money as alleged in the bond creating the charge, and that the bond was executed before the defendant's purchase."

A simple mortgagee sold the mortgaged property under a decree: a second mortgagee who had subsequently obtained a decree attached the sale proceeds in satisfaction of his (the second mortgagee's) claim, on the ground that although his deed and decree were the later in date, his deed was registered, while that of the first mortgagee was not. The Court rejected the second mortgagee's application, being of opinion that the time was then past for inquiring into any preferential right that he might consider himself entitled to set up against the first mortgagee on the ground of the non-registration of the latter's mortgage deed (*j*).

But registration did not give precedence to a subsequent purchaser when a prior *bond fide* purchaser had actually been put in possession under his unregistered deed (*k*).

A contract to sell land at a future period, and a payment of part of the purchase money, though unregistered, was good under the old law as against a subsequent purchaser or mortgagee with notice, although the deed under which the latter claimed was registered (*l*).

Under Act XIX of 1843, the authenticity of the deed relied on, must be established to the satisfaction of the Court, before the Court could decide which deed should have the preference. Where there were two sales, the first a *bond fide* one but unregistered, the second a fictitious one but registered, it was held that the deed recording a sale which never in fact took place, and for which no consideration was paid, could not be considered "authentic" under the terms of the Act, and that its being registered did not give it

(*j*) S. D. A. 1857, p. 147. See 22 W. R. 354.

(*l*) 3 W. R. 64. See 3 W. R. 104.

(*k*) S. D. A. 1857, p. 1621.

priority over the other. "There was no sale at all, but a mere pretence. A deed recording a fictitious sale cannot be considered authentic: an authentic document must be a record of a real or actual transaction, not of a fictitious one" (m).

In the case of *Sreenath Bhattacharjee v. Ramcomul Gangooly* (n), the Privy Council in delivering judgment said: "the proviso is, that the authenticity of the deed be established to the satisfaction of the Court. The word 'authenticity' would seem, according to its natural meaning, to point merely at the exclusion of a forged deed from the benefit of the Act. But their Lordships think that it could not be intended by the Act, that a deed which was tainted by fraud, though in other respects genuine, should be placed on the same footing as an honest *bona fide* deed. They are not disposed so to construe the Act; but they think that at all events a registered deed cannot be deprived of the priority given by the Act, unless it be both alleged and proved that there was fraud on the part of the grantee."

Under the old law, it was the duty of the Registrar to inquire into and ascertain the due execution of a deed presented to him, before admitting it to registration; but he had no right to institute any inquiry as to the consideration which had passed (o).

(m) S. D. A. 1853, p. 245: 1858, pp. 960, 1051. 8 N. W. P. 297: 9 N. W. P. 149: N. W. P. 1860, p. 267. 1 Hay, 261. 3 W. R. 216: 8 W. R. 300.

(n) 10 Moore 220, Suth. P. C. p. 600.

(o) The Agra Sudder Court (No. 803, 19th June 1850) to the Judge of Bareilly, Rep. Sel. Com. on Indian Territories, 1852, Ap. p. 614. 9 N. W. P. 183. But see S. D. A. 1856, p. 469.

CHAPTER VI.

OF STAMPS ON INSTRUMENTS OF MORTGAGE.

ALL instruments of mortgage must be written on stamped paper. A document which ought to be, but is not, properly stamped cannot be used in enforcing the rights passed by it : practically, therefore, no instrument of mortgage is effective so long as it is not duly stamped. It may be possible to stamp a document after execution (*a*) ; but when it is, a heavy penalty has to be paid for the privilege.

Documents executed prior to the 1st of October 1860, must be stamped in accordance with Reg. X of 1829. Those executed on or after that date, but before the 1st of June 1862, must be stamped as provided in Act XXXVI of 1860. If executed on or after the 1st of June 1862, and before the 1st of January 1870, they must be stamped in the manner prescribed by Act X of 1862. Act XVIII of 1869 applies to all instruments executed since the commencement of 1870.

As to instruments executed before the 1st of October 1860.

All such deeds must be stamped as provided for by Reg. X of 1829 (*b*). Under a general rule in a schedule annex-

(*a*) Act XVIII of 1869, secs. 20, 24.

(*b*) Article 35 of Schedule A, Reg. X. 1829 declares that every deed of mortgage or conditional sale, kut-kubala, bye-bil-wufa, bhog-banduk, &c., with or without possession given, of or for any lands estate or property, real or personal, intended as a security

for money due or to be lent thereupon, also every deed or contract accompanied with a deposit of title deeds to any property, when the same may be made as the security for the payment of money due or lent at the time, is to be charged with such stamp duty as is in the Regulation declared.



ed to this Regulation, the Courts used to hold that if the signature or seals of the parties and witnesses to a deed were not all written on the sheet bearing the stamp, the deed was illegally executed and could not be treated as duly stamped (c). But that general rule was subsequently repealed (d).

When the mortgage deed contained any matter beyond that which was incidental to the mortgage, the same duties were payable as if the mortgage and other matter had been contained in separate instruments. Thus a suit was brought to recover money advanced on a *ticca zur-i-peshgee*,—which apparently was a bond for the sum lent, with interest, accompanied by an agreement that the mortgagee should hold certain lands at an annual rent of Rs. 500, till the advance was paid off. The deed was stamped as a simple bond, and the mortgagee sued on it as such, seeking, not to obtain possession, but only to recover the money lent. It was held that this instrument required the stamp of a lease, and that it was not sufficient that it should be stamped as a bond, the stamp for a simple bond being of smaller value than that for a lease (e).

The stamp to be imposed on a document was the largest applicable to its nature, not that required by the nature of the suit (f). But if the double matter were immaterial and could be treated as mere surplusage, no stamp was required in respect of it (g).

As to instruments executed on or after the 1st of October 1860, but before the 1st of June 1862.

Act XXXVI of 1860 is so similar to Act X of 1862 (which came into force on the 1st of June 1862), that it seems sufficient for the purposes of this treatise that the latter only should be referred to. The two Acts do never-

(c) S. D. A. 1853, p. 965 : 1854, 1860. p. 464 : 1856, p. 556 : 1858, pp. 477, 504.	(e) S. D. A. 1853, p. 269.
(d) Act XLI of 1858, sec. 2, since repealed by Act XVIII of	(f) See S. D. A. 1853, pp. 569, 942.
	(g) S. D. A. 1853, p. 828.



theless differ in various respects : and it is therefore necessary to consider Act XXXVI of 1860 itself, in cases which come within its provisions.

As to instruments executed on or after the 1st of June 1862, and before the 1st of January 1870.

Every document of mortgage (*h*) or conditional sale, assignment, pledge, or hypothecation, or of any acknowledgment in the nature of a mortgage, conditional sale, pledge, or hypothecation, of or in respect of any immoveable property with or without possession given, or of any personal property without possession given, intended as a security for money due or to be lent thereupon ; and every deed or contract accompanied with a deposit of title deeds to any property, where the same is made as security for the payment of money due or lent at the time—must bear the same stamp as is required for a bond for the payment of the amount due or lent (*i*).

Every document of mortgage or conditional sale, assignment, pledge, or hypothecation, or of any acknowledgement in the nature of a mortgage, conditional sale, assignment, pledge, or hypothecation given for a loan or advance made on the deposit of any personal property (*j*), must be stamped as a promissory note (*k*).

Every instrument of mortgage or conditional sale, assignment, pledge, or hypothecation, with or without possession given of any immoveable property, or of any right, title, or interest therein, intended as security for the transfer of a Government security, or for the payment of an annuity for a fixed period, or for the delivery at a future date of any matter or thing capable of being valued, must be stamped

(*h*) Act X of 1862, Schedule A, Art 46.

(*i*) Art. 12 gives the stamp duty payable in respect of a bond or other obligation for the payment either absolutely or conditionally of any definite or certain sum of

money.

(*j*) Art. 47.

(*k*) Promissory notes are to be stamped like Bills of Exchange, and Art. 10 lays down the rates for Bills of Exchange.



as a bond for the total amount assured, or for the *bond fide* value (*l*).

Every document of mortgage, or conditional sale, assignment, pledge, or hypothecation, with or without possession given, of any immoveable property, or of any right, title or interest therein, given for the security of an annuity for an indefinite period, such as a life annuity, is liable to the same stamp as for ten times the annual payment. If it is stipulated that the amount secured by such mortgage shall not exceed a certain sum, it must have the same stamp as for an instrument of mortgage of such limited sum : but when the total amount secured by the mortgage is unlimited, an *optional* stamp (*m*).

For every document of mortgage where a bond has been already taken for the amount secured, or where, from any other cause, the mortgage is merely a collateral security to some other transaction in which an instrument requiring a stamp has been executed, the stamp (*n*) must be the same as for the bond or other instrument if of value not exceeding eight rupees,—otherwise a stamp of eight rupees must be imposed.

Where there are more instruments than one required to execute a mortgage in the manner desired by the parties, then for every deed other than the principal instrument (provided the latter has been duly stamped) the same stamp is required as for the principal document if of value not exceeding eight rupees,—otherwise a stamp of eight rupees (*o*).

An agreement or memorandum in the nature of a mortgage must be stamped as a mortgage (*p*).

(*l*) Art. 48.

(*m*) Art. 49. See Sec. 27, which enacts that no deed having an "optional" stamp shall be held to be valid in respect to any sum of money larger than that for

which the stamp on the instrument would be sufficient.

(*n*) Art. 50.

(*o*) Art. 50, *note*.

(*p*) Sch. A. Art. 1.



As to instruments executed on or after the 1st of January 1870.

The present Stamp law—Act XVIII of 1869, came into force on the 1st of January 1870. In Sec. 3, cl. 18 the term “mortgage-deed” is defined as including every instrument evidencing a pledge of property for securing the payment of money: and “property” is declared to mean property being in British India (*q*).

Every mortgage deed (whatever may be the nature of the mortgage) must be stamped as directed by the Act. But the amount of the stamp duty payable is not the same in every case. Art. 5 of Schedule I declares the amount of stamp duty payable in respect of a bond for a specified amount, not being an administration bond (*r*). A mortgage deed when possession of the property comprised therein is not given by the mortgagor at the time of execution, is liable only to the same stamp duty with which a bond for the amount secured is chargeable (*s*). And so is an instrument of further charge on such property whether by indorsement or otherwise (*t*). A mortgage-deed to secure the due execution of an office, or to account for money received by virtue thereof,—if the amount secured does not exceed Rs. 3000 is liable to the stamp-duty with which a bond for such amount is chargeable: but if the amount secured exceeds Rs. 3000, or is not expressed, then the stamp is Rs. 16 (*u*). And so also is an assignment of any interest secured by a bond or mortgage deed (*v*).

(*q*) See *Moran v. Mittu Bibee*, 2 I. L. R. 58 (87), as to letters of assignment of indigo to be manufactured.

(*r*) The duty payable is as follows:—When the amount secured does not exceed Rs. 25,—2 annas: when it exceeds Rs. 25 but not Rs. 50,—4 annas: when it exceeds Rs. 50 but not Rs. 100,—8 annas: for every Rs. 100 or part thereof above Rs. 100 up to Rs. 1000,—8 an-

nas: for every Rs. 500 or part thereof above Rs. 1000 up to Rs. 10,000,—Rs. 2, and 8 annas: for every Rs. 1000 or part thereof above Rs. 10,000 up to Rs. 30,000,—Rs. 2, and 8 annas: and for every Rs. 10,000 or part thereof above Rs. 30,000,—Rs. 12 and 8 annas.

(*s*) Sch. I, Art. 10 and 5.

(*t*) *Ib.* Art. 11.

(*u*) *Ib.* Art. 12.

(*v*) *Ib.* Art. 13.

But a much heavier stamp is required for a mortgage deed when possession of the property comprised therein is given by the mortgagor at the time of execution (*w*). And a similar stamp is payable on an instrument of further charge on such property whether by indorsement or otherwise (*x*).

Every lease except one granted to a cultivator (*y*) is also liable to stamp duty (*z*), and so is a surrender of a lease (*a*), and a copy, duplicate, or extract attested to be a true copy duplicate or extract (*b*).

On a counterpart of a mortgage deed or lease, a stamp of one rupee is payable (*c*). And a bond or mortgage-deed executed as a collateral security for the performance of any act, where such performance is secured by some instrument previously executed on stamped paper in accordance with the law in force in British India at the time of its execution, is liable to a stamp of two rupees (*d*). So also is an instrument evidencing an agreement to secure the repayment, on or before the expiration of three months from the date of such instrument, of a loan made upon the deposit of title-deeds or other valuable security (*e*). On a re-conveyance of mortgaged property, when the original mortgage-deed has been stamped in accordance with the law in force here at the time of its execution, there must be paid a stamp duty of four rupees (*f*).

In the absence of agreement to the contrary, the expense of providing the proper stamp shall, in the case of a con-

(*w*) Act XVIII of 1869, sch. I, Art. 16.—When the amount secured does not exceed Rs. 50, the duty is 8 annas: when the amount exceeds Rs. 50 but not Rs. 100,—1 rupee: for every Rs. 100 or part thereof exceeding Rs. 1000 up to Rs. 10,000,—5 rupees: for every Rs. 1000 &c. exceeding Rs. 10,000, up to Rs. 30,000,—5 rupees: for every Rs. 10,000, &c. exceeding Rs. 30,000 up to Rs. 100,000,—50

rupees: and for every Rs. 20,000 in excess of Rs. 100,000,—15 rupees.

(*x*) *Ib.* Art. 17.

(*y*) Sec. 15, cl. 9.

(*z*) Sch. I, Art. 19.

(*a*) *Ib.* Art. 20.

(*b*) *Ib.* Art. 23.

(*c*) Sch. II, Art. 16.

(*d*) *Ib.* Art. 20.

(*e*) *Ib.* Art. 21.

(*f*) *Ib.* Art. 27.



veyance, mortgage-deed or lease, be borne by the grantee, mortgagor or lessee,—and in the case of a counterpart of a lease by the lessor (*g*). Instruments reserving interest are not chargeable with a higher duty than that which would have been payable had interest not been mentioned (*h*).

When the value of the subject matter of a bond or mortgage-deed cannot be ascertained, the proper stamp to be borne by the instrument may be determined by the person by whom the expense of providing the stamp has to be borne: but under such instrument nothing is recoverable beyond the highest amount for which, if stated in an instrument of the same denomination, the stamp actually used would have been sufficient (*i*).

The whole amount secured, for the payment of an annuity or other sum payable periodically for an indefinite time, by a bond or mortgage-deed, shall (as regards the stamp duty) be deemed to be ten times the amount of the payment calculated for one year (*j*).

Where more instruments than one are required for the completion of a transaction involving the execution of a mortgage-deed, &c., the proper stamp shall be borne by the principal instrument executed, and each of the other instruments shall bear a stamp of one rupee,—but the instrument liable to the highest rate of duty shall be deemed the principal instrument: and if it is doubtful under what precise definition an instrument falls, it must be stamped according to the highest rate which can be applied to it (*k*).

No instrument which is not properly stamped can be received in any Court of justice or by any person having authority to receive evidence, as creating, modifying or extinguishing any right or obligation,—or as evidence in any civil proceeding: nor can it be acted on by any Court or any public officer: nor can it be registered or authentic-

(*g*) Act XVIII of 1869, sec. 6.

(*j*) Sec. 12.

(*h*) Sec. 9.

(*k*) Secs. 13, 14.

(*i*) Sec. 11 and sec. 6.



ated by any public officer (*l*). But it is admissible in any criminal proceeding, save under Ch. XXII of the Code of Criminal Procedure (*m*).

If an instrument not properly stamped is produced in a civil Court, the Court if satisfied that the omission to execute the instrument on proper paper did not arise out of any intention to evade payment of the duty, may receive such duty together with a heavy penalty (on a scale prescribed by the law) and shall certify by endorsement on the instrument that the proper duty has been levied on it : and this certificate is conclusive evidence as to the amount of stamp duty leviable on the instrument, which thereupon becomes admissible as if originally executed on paper bearing the proper stamp (*n*).

A judge acting under this section received the stamp duty payable on a document, together with the penalty, and endorsed his certificate on it. Immediately afterwards (as the case proceeded and he came to read the document carefully) he found that he had made a mistake. It was clear upon the face of the document that in omitting to stamp it, the parties were intentionally evading the stamp law : and the Court found as a fact that they acted with that intention. Nevertheless, the judge having already endorsed his certificate, received the document in evidence. On appeal, the High Court held that a certificate granted under such circumstances was not such a certificate as is contemplated by section 20, and did not render the document admissible (*o*).

Any one who, with the intention of evading the stamp law, executes a document on unstamped or insufficiently stamped paper, exposes himself to the risk of a criminal prosecution : for when any such instrument is filed or exhibited in any Court, the Court may impound it and send it to the Collector,—who is directed by the Act thereupon to pro-

(*l*) Act XVIII of 1869, Sec. 18.

(*n*) Sec. 20.

(*m*) *Ib.*

(*o*) 24 W. R. 89.



secute the offender. And there is a similar danger if the document is produced before any registering or other public officer (*p*).

If there is a doubt as to the proper duty to be paid, an application may be made to the Collector, who will adjudicate on the question (*q*). His decision however is open to revision on appeal, by the chief controlling revenue authority (*r*),—who may make a reference to the High Court (*s*). When any document is produced before the Collector otherwise than for the purpose of obtaining an adjudication as to the proper stamp to be paid,—or is sent to him by a registering or other officer (under Section 23), the Collector may deal with the case like a civil Court acting under section 20,—or he may remit the penalty (*t*).

When any property is sold and conveyed subject to any bond or other debt, or to any gross or entire sum of money, such debt or sum shall be deemed the consideration money or part of the consideration money (as the case may be) in respect whereof the stamp duty is to be paid. And if the full consideration money is not set forth as directed by the Act, severe penalties are incurred by both seller and purchaser (*u*). And any attorney, vakil, mukhtar or other person employed in preparing an instrument in which the Act requires the full consideration money to be truly set forth, who knowingly inserts in the instrument any other than the full consideration, also makes himself liable to heavy penalties,—extending in the case of an attorney, vakil or mukhtar to disability to practice (*v*).

If a document has been improperly received in evidence without a stamp, the absence of the stamp is no ground upon which an Appellate Court can reverse a decree based on that document,—unless the error of receiving the document without a stamp affected the merits of the case or

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| (<i>p</i>) Act XVIII of 1869, secs. 22, | (<i>s</i>) Sec. 41. |
| 23, 24, 29, 43. | (<i>t</i>) Sec. 24. |
| (<i>q</i>) Sec. 39. | (<i>u</i>) Sec. 34. |
| (<i>r</i>) Sec. 40. | (<i>v</i>) Sec. 35. |



the jurisdiction of the Court (*w*). The Madras High Court however has held otherwise (*x*).

When the District Court has refused to allow the full amount required to make up the proper stamp duty to be paid, on the ground that the document was intentionally executed on an insufficient stamp, for the purpose of evading the law,—the High Court will not in special appeal question the correctness of the finding of the lower Court (*y*).

Where both the lower Courts (the Court of first instance and the Court which hears the case in regular appeal) hold a document to be insufficiently stamped,—and the person relying on the document does not offer in either Court to remedy the defect by paying the stamp duty and penalty, the High Court will not in appeal allow them to be paid. To do so would be to admit, on special appeal, fresh evidence which the party offering it might have given in the Courts below if he had not persisted in taking a wrong view of the law (*z*).

(*w*) 3 B. L. R. a. j. 126 : 7 B.
L. R. 653.

(*x*) 3 Mad. 297.

(*y*) 10 Bom. 406. See *ib.* 441.

(*z*) 10 Bom. 441.



CHAPTER VII.

OF THE RELATIVE ESTATES AND DUTIES
OF THE MORTGAGOR AND THE
MORTGAGEE.

ON the execution of the mortgage, the proprietary right still remains in the mortgagor, even although the possessory right may have passed to the mortgagee.

Whichever party has possession, whether he be the mortgagor or the mortgagee, is in the position of a trustee: he is not the absolute owner of the land, but holds it subject to the rights of the other. The mortgagor must use it as liable to become the property of the mortgagee, and must not do any thing that tends to injure or diminish the security on the strength of which he has received the money of the latter. The mortgagee in possession must, as a mere trustee for the mortgagor, manage the land according to the best of his ability, regulating the expenses carefully, and applying all the profits to the satisfaction of his claim: and he must take the same care of the estate as he would of his own, and must admit no claim upon it until assured of the title of the claimant (*a*). The mortgagee is in most cases liable to account for his management: the mortgagor never is so.

The mortgagee's rights are of course always subject to any lien or incumbrance, as a lease or a mortgage, existing prior to the date of his security. And he cannot repudiate

(*a*) S. D. A. 1859, p. 1273.



engagements binding the land, previously entered into by the mortgagor (b).

Where a mortgagee entitled to possession finds a third party in possession under a mokurreri lease granted shortly prior to the mortgage, and sues to have it declared that the mokurreri was taken in fraud of the mortgagee and therefore is not binding as against him,—the mortgagee as plaintiff must give some evidence to impeach the lease: but if he makes out a good *prima facie* case to impeach the validity of the mokurreri, then the *onus* is shifted and the mokurreridar must prove that the lease was really executed before the mortgage, and *bond fide* for a real consideration and was intended to be operative as against the grantor of the lease (c).

A mortgagee who is entitled to possession, has generally a right to have his name registered in the Collector's books as mortgagee, in the place of that of the mortgagor (d): and he has a right to appear at a revenue settlement as an objector to the settlement then made, or as a claimant of the settlement.

In a case which came before the Privy Council, the mortgagee had taken no steps to obtain possession or to foreclose, for many years after he might have taken them: and the mortgagor meanwhile sold part of the property to a purchaser whom he put in possession and who got his name substituted in the Collectorate for that of the mortgagor. Their Lordships on this observe: "It may be, and probably is, better that mortgagees keeping their securities locked up in their strong boxes and allowing the mortgagor to be the ostensible owner in possession for a long series of years should occasionally, as in this case, find themselves deprived of portions more or less small of the mortgaged property, than that *bond fide* purchasers and persons

(b) S. D. A. 1849, p. 341. N. General of Bengal, 23 W. R. 111 (P. W. P. v. 8, p. 515: v. 9, pp. 366, C.)

585: v. 10, p. 408.

(d) See Reg. VIII. 1793, sec. 28.

(c) *Shannarain v. Administrator*



claiming under them, after many years' possession and possibly much expenditure, should be ousted under a mortgage title perhaps half a century old, because somebody has been paying interest on the mortgage money. In the present case an actual mutation of names took place, and a very slight degree of vigilance would have enabled the mortgagee to assert his title earlier (e)."

When a mortgagee of a "maafee" tenure was no party to resumption proceedings under Act X of 1859, sec. 28, and the land was resumed with the mortgagor's consent, the mortgagee was held to be entitled to question the *bonâ fide* character of the resumption proceedings (f).

A person admitted to settlement as a shareholder, and who continues recorded as lumberdar, may sue to recover his share of the produce of the estate, without first bringing a suit to establish his right to possession. His being so admitted and recorded, gives him a *primâ facie* title to be heard on the merits of his claim (g).

In a pure usufructuary mortgage, the mortgagee has from the first a possessory right: but he never has any thing more, as the proprietary right remains always in the mortgagor. In simple mortgages, no proprietary or possessory right vests in the mortgagee at all, and he is not even in a position which entitles him to appear at a revenue settlement, either as a claimant or in any other capacity (h). In mortgages by conditional sale, the proprietary right, and also the possessory, vest in the mortgagee, when the term fixed for the re-payment of the loan has elapsed, and the process of foreclosure has been completed,—but not till then (i).

An estate was sold for arrears of revenue in 1840 under Reg. XI of 1822, which was then in force, and a mortgagee in possession sued under Sec. 25 of that Regulation

(e) *Brojonath Koondoo Chowdry*
v. *Khetul Chunder Ghose*, 14 Moore
144 (151), 8 B. L. R. 104.

(f) 2 Agra, p. 117.

(g) 10 N. W. P. 494.

(h) 8 N. W. P. 489.

(i) S. D. A. 1849, p. 302. See
10 N. W. P. v. 453.



to set aside the sale. It was held that his suit would not lie, as a mere mortgagee in possession has no right of ownership, and the Regulation gave the right of action to *proprietors* only (*j*). "The right of ownership in the mortgaged property does not pass to the mortgagee leaving only the equity of redemption to the mortgagor. The right of ownership, together with the right of redemption, remain with the mortgagor: and until the property be actually foreclosed and the sale become absolute, the right of ownership does not pass. The doctrine is equally applicable to conditional sales or usufructuary mortgages: it follows that the mortgagees in the present case who, whatever the nature of the mortgage, were in possession, were simply usufructuaries, and as such enjoyed no right of ownership. Such being the case, the registration of their names incorrectly as proprietors, or the entrance of their names in the sale advertisements as such, when in fact and admittedly they were no such thing, cannot alter the nature of their rights or convert a lower into a higher title. Being as they are usufructuaries, they should with a view of saving their right, have paid in the revenue and stayed the sale, and they would thus have had an action against the actual proprietors for money paid on their account to protect an interest of the payer in the property."

Where there was an usufructuary mortgage, and the mortgagee, having been ousted, sued to recover possession on the ground of proprietary right,—the Court held that his suit would not lie, as he had no proprietary right, and ought to have sued for possession merely as mortgagee (*k*).

It is the duty of a mortgagor to take all legal means to protect his rights in the property mortgaged by him: and the mortgagee will be entitled to recover damages for any loss he may sustain through neglect of that duty (*l*).

The Government revenue is a charge upon the land out of which it is payable, and takes precedence of all other

(*j*) S. D. A. 1858, p. 840.

(*l*) See S. D. A. 1857, p. 1195.

(*k*) 7 N. W.P. 5. See 11 N. W.P. 75. 1853, p. 575.



claims. Consequently a mortgage does not in fact pledge any thing more than the receipts in excess of the revenue payable in respect of the land mortgaged. It is therefore, *prima facie*, the duty of the person who is in actual possession and registered as proprietor, to pay the Government revenue (*m*): and any loss arising from the neglect of this duty, must be borne by him. Hence, if the mortgagor in possession allows the land to be sold for arrears of revenue, the mortgagee has a lien on any surplus remaining in the Collector's hands after payment of the revenue due (*n*). And if the mortgagee pays the revenue in order to save the estate, he may add the amount so paid to the mortgage debt (*o*). And if property mortgaged by conditional sale remains in the possession of the mortgagor, and is sold for arrears of revenue, the mortgagee can recover from the mortgagor, the balance due to him, with interest,—instead of being left to his remedy against the land alone, as he otherwise would be (*p*). So, on the other hand, an usufructuary mortgagee, who, being in possession of the mortgaged estate, allowed the Government revenue to fall into arrears during his management, in consequence of which, the Collector farmed the property for some time, was held responsible for the profits of the term during which the Collector was in possession (*q*). And an usufructuary mortgagee has no claim against the mortgagor personally, for Government revenue paid by him while in possession, although such payments will be credited to him on adjusting the accounts between them. "The mortgagee has no right of separate action for the amount so paid, while he remains in possession" (*r*).

But it is only the revenue which accrues during the time of his possession, that the mortgagee is bound to pay:

(*m*) S. D. A. 1852, p. 673.

(*n*) 16 W. R. 222.

(*o*) See *Nugender Chunder Ghose*

v. Kamince Dossee, 11 Moore 241.

See also 14 B. L. R. 155. Act XI of 1859, sec. 9.

(*p*) S. D. A. 1848, p. 368.

(*q*) 3 N. W. P. 417; see 7 N. W. P. 7.

(*r*) S. D. A. 1852, p. 1063. See

S. D. A. 1848, p. 346, and 9 N. W. P. 378.



all arrears fallen due before the date of his entry, remain payable by the mortgagor.

A mortgagee being in possession, the Collector came in and farmed the property, not on account of any fault or mismanagement on the part of the mortgagee, but for an old balance of revenue fallen due before the commencement of his interest as mortgagee. The mortgagee, after a time, came forward and paid up the arrears, whereupon a farming settlement of ten years was granted to him by the Collector. It was held, that the mortgagee was entitled to all the profits during these ten years, without rendering any account to the mortgagor: that he was in no way bound to pay the arrears, and having done so, must be treated as an entire stranger would have been, under similar circumstances (s). However, the Court expressed a doubt whether the Collector acted rightly in admitting the mortgagee in possession of the defaulting mehal, to engagements as farmer by the process of transfer.

There was a mortgage of a *dur-putnee* tenure, the mortgagee not having possession. The putneedars fell into arrears, and the mortgagee paid the sum due and saved the tenure from sale. It was held that he could not recover the sum so paid from the putneedars, but that he had a good right of action for it as against the *dur-putneedar*, his own immediate mortgagor (t).

If one joint tenant pays the amount of Government revenue due for all, he can recover from the other joint tenants the proportions which it was their duty to have paid. And a mortgagee, being responsible for and having paid the revenue for a whole talook, part of which was in possession of another party by whom the revenue for that part should have been paid, can recover the amount he has paid in excess of his own share, from the person who has made default (u).

But where a sharer had paid the Government revenue for

(s) 7 N. W. P. 7.

(u) See 7 W. R. 377 (F. B.)

(t) S. D. A. 1857, p. 1195.



the whole estate, and the persons in possession as co-sharers when the revenue accrued due, were afterwards found to have been wrongfully in possession, and the right as joint tenants was declared by a decree of Court to be in certain other persons, it was held that the latter, who were put in possession under the decree, were not liable in respect of the revenue which had been paid for their shares, because they were not in possession when it accrued due (*v*).

A person who *bond fide* believed himself to be mortgagee, but who could not prove that he in fact was so (because he could not prove a power of attorney under which the instrument of mortgage purported to have been executed), paid certain sums for Government revenue in order to save the estate from sale. It was held that though he failed to establish his mortgage, the payment he had made was not a merely officious one, and that he was entitled to recover the amount from him whom he believed to be the mortgagor, and for whose benefit he had paid it (*w*).

If a mortgagee in possession allows the Government revenue to fall into arrear, with a view to the land being put up to sale and his becoming himself the purchaser of it, and he does in fact so become the purchaser of it, such a purchase gives him no absolute title. One who being in possession as mortgagee or trustee, fraudulently obtains the proprietary right, is to be treated as still in the position of trustee, as regards the person defrauded.

This was so ruled by the Supreme Court in a case (*x*), in which the Judges said :—" We continue to hold the opinion we expressed at the hearing, that the revenue laws cannot protect such a transaction as this last : that a mortgagee in possession of an estate and registered as its owner, who properly or improperly suffers that estate to fall into

(*v*) S. D. A. 1855, p. 44.

(*w*) 5 W. R. 126.

(*x*) *Raja Ojooderam Khan v. Aushootosh Dey*, Supreme Court,

6th July 1852, reported in the

"Englishman" newspaper, 8th July

1852. See also *Kelsall v. Freeman*,

"Englishman," 4th February 1854.



arrears, cannot be allowed to purchase it at a Government sale, to the prejudice of his mortgagor and so as to acquire an irredeemable interest in it. Upon such a purchase a Court of Equity on general principles will fasten a trust, and hold that the mortgagee, subject to the repayment of the amount due on the mortgage, and of his expenses properly incurred, is a trustee for the mortgagor."

The rule thus laid down has been approved of and confirmed by the Privy Council: so that the law upon the subject must now be taken as finally settled (*y*).

More than fifty years after a sale for arrears of revenue, at which sale the mortgagee became the purchaser, the heirs of the mortgagor sued to recover possession on the ground that the relation of mortgagor and mortgagee still subsisted. It was held that as the sale had been unquestioned for fifty years, and as the mortgagor and his representatives if they had used ordinary diligence, could not have remained ignorant of the sale, the suit was barred (under the old law of limitation) in the absence of any special proof of fraud (*z*).

There was a mortgage in the English form, and the mortgagor remained in possession under it. Being so in possession he, for the purpose of defrauding the mortgagee, made wilful default in the payment of Government revenue, and at the sale which was held in consequence, he himself purchased the property *benamée*. The Court was of opinion that such conduct was highly fraudulent and that the mortgagor had committed a criminal offence under section 405 of the Indian Penal Code (*a*).

It has been held that where the agreement is that the mortgagee shall remain in possession of the land until the principal and interest are paid from the profits, the

(*y*) *Nawab Sidhee Nazir Ali Khan v. Oojooderam Khan*, 10 Moore 322, 5 W. R. P. C. 83: (*z*) *Marshall*, 391.
Sukheemoney Dossee, 14 Moore 289 (305), 10 B. L. R. 19.
Juggut Mohini Dossee v. Must. (*a*) 5 W. R. p. 230.



mortgagee is bound to continue in possession so long as there is any thing due to him on the mortgage: at least, if he cannot shew good cause for not doing so, he will have no personal claim on the mortgagor for any part of his debt (b).

But this is scarcely in accordance with the decision of the Privy Council in an appeal in a case from Bombay. The facts there were as follows. A mortgage of the revenues of a village was executed by the firm of *Lal Kishen*: and the mortgage deed contained a stipulation that the receipts should be applied in liquidation first of interest and then of principal, and that the mortgagees "shall continue so to receive and appropriate the annual produce, until the whole of their demand be liquidated." The deed further provided that the mortgagees should station a clerk of their own in the village to make the collections, who was to receive his monthly salary and daily food from the mortgagors. A clerk was accordingly appointed who received the rents and profits of the village for some years, but afterwards permitted the mortgagors to receive them for four or five years. *A* was one of the partners of the firm of *Lal Kishen*, and was therefore (though he did not personally execute the mortgage deed) in the position of a mortgagor. The partnership was put an end to, and on arrangement of its affairs the mortgaged estate became the property of partners other than *A*. *A* having got a decree against his late partners for a sum of money which was due to him, proceeded to enforce his claim by attaching the property. Until this attachment, the mortgagees had no notice of *A*'s claims. The Privy Council held (c) that in effect the mortgage-deed contained "merely a power (for the mortgagee) to satisfy himself, just as an English mortgagee may, by taking possession of the rents and profits of the estate." Their Lordships observed,—“If an English mort-

(b) S. D. A. 1850, p. 44.

Brijbookun Das, 2 Moore 487, 6 W.

(c) *Jugjeevwan Das v. Ram Das*

R. P. C. 10.



gagēe chooses to forego the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagor. He would have a full right to recover his debt by reason of the mortgage. The only effect would be when some subsequent incumbrancer came in and he had notice of that claim. In that case the rule and law in England would be that if, after notice, he permits the mortgagor to receive the rents and profits, he exposes himself to the claim of the second incumbrancer : and that is the principle which their Lordships think ought to be applied to this case." Their Lordships go on to say that when *A* proceeded to enforce his claim by attachment, but not before, he became in the position of a second incumbrancer : "and therefore their Lordships are of opinion that though possession was taken by the mortgagee by means of his *mehṭa* (clerk), and though he might have received the proceeds of the village from 1819 to 1824 or 1825, yet he is not to be charged in account with more than he actually received during that time. But when the attachment was placed on the village, he had notice of an adverse claim, and if after that time he permitted the mortgagor to receive any portion of the profits of that estate, then he ought with respect to the monies so received to be postponed to the subsequent incumbrancer. * * He is to be charged for about two years, during which time he permitted the mortgagors, after the attachment was placed, to receive the rents and profits of the village."

The mortgagee in possession must see to the proper management of the estate, and will be held responsible for any waste or actual damage committed or done by him, and for any deficiency in receipts arising from negligence or misconduct on his part. The mortgaged property being a house, the mortgagee in possession ought to keep the premises in repair so far as is necessary for their proper preservation and use : and in accounting he will be allowed all monies properly expended for this purpose, with in-



terest (*d*). And a mortgagor is entitled to recover damages from his mortgagee, and also from a sub-mortgagee or any other person who has joined in the act complained of, for injury caused to the property by the acts of the mortgagee and others during the time of their being in possession (*e*). So, he may recover damages for waste committed,—as by the improper cutting down of trees (*f*). But those only are liable in damages, who have been guilty of the grievance for which redress is sought: and therefore a sub-mortgagee is not liable for damage caused before his entry (*g*).

It is duty of the mortgagee in possession to realise balances duly from the cultivators on the estate; and if these balances are lost through his negligence, they will be charged against him in taking the accounts (*h*). He must pay the wages of village chowkidars and putwarees, and all other regular village expenses; these are altogether independent of the will of the mortgagee, and are payments which he, as representative of the owner, is compelled by the orders of Government to make (*i*).

Every mortgagee in possession is bound to keep regular and accurate accounts of all sums received and expended by him in the management and preservation of the property, and if he fails to do so, the Courts make it a rule to lean against him, and to resolve all doubtful points in favor of the mortgagor (*j*).

It has been held that a mere usufructuary mortgagee has no right to plant trees on the land held by him under mortgage (*k*). But this cannot be accepted as a rule applicable to all cases.

A mortgagee of a share in a joint estate has no such right as entitles him to sue for a partition, even although the mortgagor acquiesces in his doing so. "The plaintiff

(*d*) 9 W. R. 488.

(*e*) 7 N. W. P. 436.

(*f*) 9 N. W. P. 1.

(*g*) 7 N. W. P. 436.

(*h*) 9 N. W. P. 159, 371.

(*i*) 7 N. W. P. 248, 477; 9 N.

W. P. 371.

(*j*) 10 N. W. P. 684. See W. R. 1864, p. 177; 5 W. R. 271; 18 W. R. 65 (68); and see *post* Chapter X, on accounting.

(*k*) 1 Agra, 281.



has founded his claim on the fact that he stands in the same position as the mortgagor, and therefore that he is at liberty to sue for a division of the estate. The Court agree that in a measure he does stand in the position of the mortgagor, *i. e.* so far as he is entitled to hold the property in the same manner as he received it from the latter : but they consider that as he has no proprietary right in the estate, he cannot sue for a division of it, the proprietors being alone the persons contemplated by the law, Regulation XIX of 1814, who are competent to make such an application." And in such a case, the mortgagee seems to be entitled as against the mortgagor to possession only of the portion of the property mortgaged to him, but without disturbance of the title of the lumberdar and his position thereunder, and without interruption of the existing fiscal arrangements for the collection of the revenue and general management of the estate (*l*).

The proprietor of a talook mortgaged a two annas' share to B. Subsequently he sold a five annas' share of the same talook to C, with whom he made a butwara, under which a certain village was registered by the Revenue authorities in C's name, and as representing his five annas' share. The Court held that on the completion of the butwara, B lost all lien over the two annas' share of the village made over to C, and that thenceforth his lien was limited to such a share of the remainder of the talook as corresponded with a two annas' share of the whole talook as it originally stood. As there was no allegation of fraud on the part of the proprietor and C, and as the partition was executed under a butwara by the Revenue authorities, the Court was of opinion that the partition must be taken as final and conclusive (*m*).

So the Privy Council have declared it to have been settled by decisions and upon the construction of the Regulations

(*l*) 10 N. W. P. 453.

(*m*) S. D. A. 1857, p. 358.





that a mortgagee who has not perfected his title by foreclosure and the consequent decree for possession can neither compel a partition nor be a party to the butwara proceedings. This was in the case of *Byjnath Lall v. Ramoo-deen Chowdry* (n). In that case, the mortgagor mortgaged an undivided moiety of two out of three villages forming a joint and undivided estate: the sharers were not members of a joint and undivided Hindu family, but enjoyed their respective shares in severalty. It was held that the mortgagor had power to pledge his own undivided share in these villages, but that he could not, by so doing, affect the interest of the other sharers in them,—and that the mortgagee took the security subject to the right of those sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. And it was further held that where a butwara is complete under Reg. XIX of 1814, the mortgagee is entitled to claim as the subject of his security, that which the mortgagor has received in substitution for the original share mortgaged. It would appear also from this case, that the mortgagee would be bound by the butwara (unless he can set it aside on the ground of fraud) although he neither was nor could be a party to those proceedings (o).

An undivided estate was mortgaged to two different mortgagees,—a one fourth share which belonged to A being mortgaged to X, and the other three-fourths which belonged to B being mortgaged to Y. The two mortgagees being in possession got a butwara by the Collector, the mortgagors not being parties. It was held that the mortgagors were not bound by the butwara and could redeem their undivided shares, and recover the undivided possession which they had given (p).

(n) 1 L. R. I. A. 106 (120), 21 W. R. 233. This overrules the case of *Baboo Nilhai Sing* 4 B. L. R. ap. 97.

(o) 1 L. R. I. A. 121.

(p) 15 W. R. 353. This decision was in 1871, before that in *Byjnath Lall's* case.

A first mortgagee being lawfully in possession under his mortgage, a second mortgagee got (as he was entitled to get) a decree for the sale of the property, but subject to the rights of the prior mortgagee. It was held that the second mortgagee had no right, in execution of this decree, to enter on the property and take actual possession through the bailiffs of the Court or otherwise. His proper course was to issue a prohibitory order under the 235th and 239th sections of the Code of Civil Procedure (*q*). And a mortgagee in possession of mortgaged premises which have been attached by a prohibitory order under section 235 in execution of a decree against his mortgagor, is entitled to come in under section 246 and claim to have the attachment removed (*r*).

A creditor may transfer to any third party a sum of money due to him, without previous reference to the person indebted, and without his consent. The transferee may resort to the same measures for the recovery of the amount of the debt, as the original creditor himself might have adopted had the transfer not taken place (*s*).

So, there is no legal impediment to the transfer by a mortgagee of his rights and interests as mortgagee, and his assignee will have in all respects the same rights and liabilities as the mortgagee himself had (*t*). But such a transfer must be without prejudice to the rights of the mortgagor. The mortgagee may put another person in his own position, but he cannot create a title in a third party, distinct from his own (*u*).

This last rule was given by the Calcutta Sudder Court as one of the grounds on which it decided that the mortgagee cannot, even in exercise of a power expressly conferred on him by the mortgage deed, sell the mortgaged property to a third person absolutely, on default being made by the mortgagor. As such a power would not enable the mort-

(*q*) *Mudhun Mohun Doss v. Gokul Doss*, 10 Moore 563, 5 W. R. P. C. 91.

(*r*) 10 Bom. 100.

(*s*) 10 N. W. P. 474.

(*t*) S. D. A. 1848, p. 530.

(*u*) S. D. A. 1847, p. 354. See 8 W. R. 399.



gagee himself to become absolute proprietor of the land, it was held that for the mortgagee to exercise such a power in favor of a third party, was to create a title distinct from his own, and therefore invalid : and that, as the mortgagee's own title was one which might be made absolute with the aid of the Courts but not otherwise, no higher right than this could be passed by him. The title passed by the mortgagee, however, when he exercises such a power, is not in fact his own right, or any part of it. A conveyance made by him under the power, is as it were the direct act of the mortgagor, the mortgagee being only the hand by which it is made (*v*).

And the mortgagor may either transfer absolutely, or mortgage his remaining interest in lands which he has already mortgaged, without first redeeming them. The purchaser or mortgagee acquires the rights and interests of the mortgagor and stands in his place : he takes the property subject to the lien of the prior mortgagee, the liabilities of the property not being affected by any subsequent transfer which the mortgagor can make. And no act of the mortgagor,—nothing, in fact, but a revenue sale,—can injure the mortgagee's lien on the land, or on that which represents the land (*w*).

A mortgagor, after having hypothecated or pledged certain lands by way of simple mortgage, had a settlement made which divested him, as proprietor, of all his rights, and assigned him a malikana allowance in lieu of his claims. It was contended that not only had the mortgagee no longer any claim on the land, but that the malikana allowance was not subject to his lien. But the Court held, that—"the thing pledged was not changed by the proceedings of settlement, so as to affect the mortgagee's lien, and that the pledge must be regarded as extending to any in-

(*v*) *Supra*, pp. 65—67. . .

6 N. W. P. 32 : 7 N. W. P. 138 :

(*w*) 4 W. R. 45 : 6 W. R. 230 :

9 N. W. P. 371, 421 : 11 N. W.

3 W. R. 230. S. D. A. 1848, p.

P. 8. See S. D. A. 1858, p. 382.

305 : 1850, p. 77 : 1857, p. 953.

terest essentially involved in, and arising from, the interests possessed in the property by the debtor at the time of the original transactions; and that the malikana right assigned to the mortgagor at the settlement, strictly fell within that category" (x).

If a first mortgagee obtains a decree against the mortgagor, declaring the debt a charge on the land, and the land is sold in execution of that decree, but does not realise more than enough to pay off the first mortgage, the auction purchaser has a title to the land free from all incumbrances subsequent in date to the first mortgage (y).

The mere purchase of mortgaged property by a third party, does not render him personally liable for the debt, to secure which the land was pledged. The lien on the property under mortgage continues, and the only effect which the purchase has on the mortgagee's position, is that it gives the purchaser, as the mortgagor's "representative," the option of redemption (z).

An agreement in general terms, such as "not to alienate any of my property until the debt has been paid,"—no property in particular being mentioned,—does not constitute a mortgage; and a *bond fide* purchase made from the debtor is good and cannot be set aside (a).

Where a mortgagor has in mortgaging certain lands expressly agreed not to alienate so long as the debt remains unsatisfied,—an alienation made in breach of this agreement has been held to be voidable by the mortgagee, if not absolutely void (b). But such alienations are bad only in so far as they interfere with the rights of those with whom the agreement not to alienate was made.

(x) 8 N. W. P. 669.

(a) S. D. A. 1855, p. 353. See 5

(y) 10 N. W. P. 227. 1 B. L.

B. L. R. 264 (F. B).

R. 152. 17 W. R. 560.

(b) N. W. P. v. 6, p. 39: v. 7,

(z) 8 N. W. P. 316. See S. D. A. 1857, p. 953; 1858, p. 358; 1859, p. 1181.

p. 614: v. 8, pp. 316, 341, 669: v. 9, p. 517: v. 10, pp. 227, 240. S. D. A. 1848, p. 682; 1851, p. 482.



An appeal was admitted, the judge being of opinion that "the condition of the mortgage (*viz.*, that the mortgagor should not alienate during its continuance), could never be intended to preclude the mortgagors transferring their own proprietary right to a third party, subject to the original mortgage. Of course, possession could not be decreed on such a transfer, until the full amount due to the mortgagee was paid or liquidated from the usufruct." And this view of the law was afterwards taken by the full Court and the transfer was declared to be valid, subject to the mortgagee's prior lien (*c*). So, where there was an agreement "not to give a *kut* or permanent pottah," and that "if any sale &c., should be made, it should be invalid," it was held that the mere giving a mortgage by conditional sale of the land referred to, was no infringement of the contract. It was, however also said that if the sale were made absolute so as wholly to alienate the property, there would then be a violation of the agreement (*d*). When in a *soolenamah* there was a stipulation in general terms not to alienate the property, a mortgage made in order to save the estate from permanent alienation was upheld. The debt for which it was mortgaged, had been incurred to save it from being sold for arrears of revenue (*e*).

There was a stipulation in a mortgage deed that until the mortgage debt was paid off, the mortgagor would not sell the property, or that if he did sell it, he would sell it to the mortgagee at a fixed price. The mortgagor subsequently executed a *hibba-bil-iwaz* giving a portion of the property to his wife in lieu of dower. The mortgagee sued to set aside the *hibba-bil-iwaz* as null and void. The Court (*f*) held that the mortgage deed merely gave the mortgagee a right of pre-emption at a fixed price, in the event of a sale being made, but did not absolutely prohibit the alienation of the property,—and that the mortgagee

(*c*) S. D. A. 1848, p. 305: and
see 1854, p. 96.

(*d*) S. D. A. 1858, p. 477.

(*e*) 6 N. W. P. 227.

(*f*) 1 Agra F. B. 69. See 1 Agra
F. B. 7.

could only sue to enforce his right of pre-emption. Not having offered to purchase, his suit was dismissed.

The general rule may be said to be that an express stipulation not to alienate mortgaged property until the debt is paid off, does not in equity preclude the mortgagor from transferring his own remaining right, or making a second mortgage,—but such transfer or mortgage will always be subject to the prior mortgage (*g*).

Thus where in contravention of an express condition not to alienate, the mortgagor transferred his proprietary right in the mortgaged property to a third person by a lease for a term of years,—the mortgagees, having obtained a decree for the sale of the mortgaged property in satisfaction of their claims, sued to have the alienation declared invalid as frustrating the execution of their decree. The Court declined to set aside the lease, but made a declaration that it would not be binding on a purchaser at a sale held in execution of the decree unless he chose to assent to the lease continuing in force (*h*).

An alienation contrary to express agreement cannot be pleaded by the alienor, for the purpose of avoiding his own act. The person whose interests are prejudiced by the alienation, can alone put in such a plea or have the transaction set aside (*i*).

The plaintiffs in a suit, sought to charge certain lands with monies due to them. The lands in question had been mortgaged in 1846 to the defendants, and the equity of redemption was sold to them by the mortgagor in 1850. Prior to the sale in 1850, a prohibition against the alienation of the lands in question, was under section 5, Regulation II of 1806, issued at the instance of the plaintiffs. It was held, that the rights and interests of the mortgagor in the property attached, as they stood on the date of the

(*g*) S. D. A. 1856, p. 942 : 1857, p. 825.

(*h*) 1 I. L. R. All. 126 : and see

the cases collected there, p. 128 note.

See 1 B. L. R. 152 : 17 W. R. 560

(*i*) 10 N. W. P. 510.



issue of the prohibition against alienation, were liable to be sold by the plaintiffs in execution of the decree they had obtained for payment of the debt due to them by the mortgagor (*j*).

A mortgage executed subsequent to and pending attachment duly made is null and void, so far as may be necessary to secure the execution of the decree. Section 240 of Act VIII of 1859 is not to be read in the widest sense, as rendering such an alienation null and void against all the world. It relates only to an alienation which would affect the creditor who obtained the attachment—being intended for *his* protection, and not for that of all persons who at any future time might possibly obtain executions (*k*).

Where there is a suit for foreclosure, and the mortgagor, a defendant in that suit, voluntarily sells, pending the suit, part of his interest in the equity of redemption, the purchaser will not be allowed afterwards to institute a new suit for foreclosure (*l*). And one who takes a second mortgage pending a suit by the first mortgagee for a declaration of his lien and sale, has no title as against a purchaser under a decree for sale in the first mortgagee's suit (*m*).

The fact of there being an existing mortgage over lands, in no way prevents the right and interest of the mortgagor from being sold in execution of a decree against him (*n*). And an execution creditor should attach those rights and interests, notwithstanding their being incumbered. If he does not do so, but remains content with a temporary arrangement such as an assignment of the rents of the estate, the mortgagor's rights may be sold and applied in satisfaction of the debt of any other decreeholder, who may afterwards come and attach them.

(*j*) S. D. A. 1856, p. 67. See 11 N. W. P. 11.

(*k*) *Anund Lal Dosè v. Jyloāhur Shaw* 14 Moore, 543, 10 B. L. R. 134 (P. C.).

(*l*) *Anundomoye Dossee v. Dho.*

nendro Chunder Mookerjee, 14 Moore 101, 8 B. L. R. 122. See 11 Bom. 24.

(*m*) 11 Bom. 64.

(*n*) See S. D. A. 1847, p. 953 : 1858, p. 498 : 1860, v. 2, p. 35.



A judgment creditor, instead of attaching the remaining rights of his debtor who had mortgaged certain property, merely applied to the Court for an assignment of the rent payable to the debtor by the lessees of that property : and these rents were accordingly paid to him, so long as the lease lasted. Another judgment creditor had his debtor's rights as mortgagor put up for sale, in satisfaction of his decree. It was held that the first creditor, having chosen to rest satisfied with the assignment and by his own laches allowed the rights of the mortgagor to get into the hands of another, had lost his remedy as against those rights, and that he had no claim against the second judgment creditor or against the estate which had passed into his hands under the sale in execution of his decree (o).

Only those rights and interests which remain to the mortgagor can be sold, and the sale of them in no way affects the mortgagee or his lien. A purchaser at a sale in execution of a decree takes only what the person whose rights are sold has to give ; and his acquisition is subject to all the conditions and incidents under which it was held at the date of the attachment (p). But, the question being whether the possession of one who had, without notice of a prior mortgage, purchased at a sale in execution of a decree obtained by a third party against the mortgagor, was possession adverse to the mortgagee,—the Privy Council held (q) “ that the title of a judgment creditor or a purchaser under a judgment decree cannot be put on the same footing as the title of a mortgagor or of a person claiming under a voluntary alienation from the mortgagor ; ” and that the possession of a purchaser under such circumstances is really not the possession of a person holding in privity with the mortgagor, or so holding as to be

(o) 8 N. W. P. 372.

8. S. D. A 1857, pp. 486, 953
1858, p. 498 : 1860. v. 2. p. 25.

(p) *Rajah Enayet Hossain v. Gir-
dharee Lal* 12 Moore 366, 2 B. L.
R. P. C. 75. 11 B. L. R. 237.
9 W. R. 244. N. W. P. v. 9, pp.
399, 559 : v. 10, p. 562 ; v. 11, p.

(q) *Amundomoye Dossee's case* 14
Moore 101 (111), 8 B. L. R. 122.
See 18 W. R. 200.



an acknowledgment of the title of the mortgagee,—for in the absence of notice of the mortgage, the possession which the purchaser supposed he acquired was a possession as owner. A purchaser at a sale in execution of a decree is entitled to all the rents due on the date of sale, or falling due afterwards. But he cannot recover from the former proprietor arrears of revenue fallen due before the sale, which the purchaser has been obliged to pay in order to prevent the estate from being sold by Government (r).

An usufructuary mortgage was granted, by way of lease, two years being the term given for repayment, there being also a stipulation that, after the lapse of that time, the mortgagee might hold on, until his claim was satisfied. It was held, that until the mortgage debt was paid, the mortgagee was entitled to possession, both before and after the expiry of the term of two years, even against a decree-holder (s).

When there is a stipulation that the mortgage debt shall be paid off on a day named, a sale of the property in execution of a decree against the mortgagor, does not diminish or affect the lien of the mortgagee, who consequently is not entitled to sue the mortgagor personally for the recovery of the debt, before the day fixed by the contract (t).

A mortgagee ought not, however, to remain quiet at the time of a sale of the mortgagor's rights and interests, but should give notice of his lien (u) : and the existence of his claim should be made known to the bidders by the officer conducting the sale.

A mortgagor impliedly warrants his title to the property which he mortgages : and if the title is defective, the mortgagee can sue for damages for the breach of contract, though there be no express agreement as to title (v).

It is the duty of a mortgagor who has covenanted to put

(r) 9 N. W. P. 344.

(u) 5 N. W. P. 3. See *ante* p. 110.

(s) 6 Sol. Rep. 175.

(v) 2 Agra, 199.

(t) 3 N. W. P. 209.



the mortgagee into possession, to do so at once, and to secure his quiet enjoyment of possession during the term agreed upon. And a mortgagor who refuses or is unable to give and to secure possession to an usufructuary mortgagee, renders himself liable to an immediate action for recovery of the money advanced, with interest.

There was an usufructuary conditional sale: the mortgage money was not repayable until the lapse of twenty years, but the mortgagee was to have possession from the date of the mortgage. Possession was withheld, and the mortgagee sued to recover the money lent by him with interest. It was held that the mortgagee was entitled to recover at once, without waiting till the end of the twenty years (*w*).

A mortgage by way of lease was granted, the condition being that the farm should continue in force until the money was repaid. Previous to payment, the mortgagor ejected the mortgagee: and the Court held that the latter might sue the mortgagor for the money, and was not restricted to a suit for possession. The mortgagor having committed a breach of contract, could not enforce fulfilment from the mortgagee of what was to be performed on his part (*x*).

In a case, which has been already referred to, of mortgage by conditional sale, the mortgaged lands were, prior to the date at which the loan was repayable, sold under a decree as belonging to a third party. The mortgagor unsuccessfully asserted his rights in the summary sale proceedings, but took no further steps to protect the mortgagee. It was decided that as the mortgagor had neglected the duty which lay upon him of preserving his rights for the mortgagee, the latter was entitled to sue to recover the money he had advanced, and was not bound to enforce his claim against the land (*y*).

(*w*) *Raja Oodit Purkash Sing v. Martindall*, 4 Moore 444. S. D. A. 860, p. 849. N. W. P. 1860, p. 280.

(*x*) S. D. A. 1852, p. 193: 1853, p. 59: 1858, p. 306. See S. D. A. 1859, pp. 58, 322.

(*y*) S. D. A. 1853, p. 575.



When the agreement was that the mortgagee should be put in possession and repay himself from the usufruct, and the mortgagor prevented his getting possession and evaded having his name registered in the Collector's books, this was held to entitle the mortgagee to sue for his money instead of for possession (x).

It would seem that if the mortgagee is deprived by diluvion of the possession of land of which he holds an usufructuary lease, before he has been repaid what is due to him, he has a right, in the absence of express agreement to the contrary, to recover from the mortgagor the unpaid balance of the mortgage debt (a). So where a house was mortgaged—the usufruct to be in lieu of interest,—and the house was burnt while the mortgagee was in possession, the Bombay High Court held that as the house perished by accident and without negligence on the part of the mortgagee, he was, in the absence of any special agreement to the contrary, entitled to sue the mortgagor for the mortgage debt (b).

In one case the mortgagee had possession, by deed of *burna*, in security for a loan. The terms of the deed were such that so long as the estate remained bound by the mortgage, the mortgagee could look no further than the estate and the convenience of the mortgagor for the discharge of the debt. The property was sold for arrears of Government revenue, and the mortgagee consequently lost possession. The sale for arrears left surplus proceeds which were claimed by and paid to a third party who held a decree against the mortgagor. The mortgagee then sued this third party for the surplus proceeds paid to him, on the ground that they represented the mortgaged estate and were bound by the mortgage. But it was held that until the mortgagee obtained a decree against the mortgagor he had no more right to the surplus proceeds or

(x) 8 N. W. P. 286. See 11 N. W. P. 115. S. D. A. 1859, p.

(a) 21 W. R. 224.

(b) 7 Bom. a. j. 116.



other assets belonging to the mortgagor than any other ordinary creditor had (c). If in execution of a decree of Court, mortgaged lands are sold subject to a mortgage, the mortgagee is not entitled to share in any surplus (d).

During the term of a zur-i-peshgee lease, the mortgagee was ejected by one who had, at a sale in execution of a decree, purchased the right and title of the mortgagor in the property. It was held that the mortgagee was not entitled to sue the ejector for the money secured to him by the zur-i-peshgee lease,—and that his only remedy was by a suit to recover possession or for damages, as the purchaser who ejected him was not privy to the contract between the mortgagee and mortgagor (e).

If it is the expressed intention of the parties, that the land, and the land only, shall be the source from which the mortgagee is in any event to be paid, he must in the first instance bring his suit for possession. The terms of a mortgage deed were, that the surplus proceeds of a certain talook should be applied to the extinguishment of the mortgage debt, "and that in the event of the non-fulfilment of this condition, the mortgagee *might sue to obtain possession of the estate.*" It was held that the mortgagee could only avail himself of the remedy expressly provided for him in his deed, and must sue for possession (f). In another case the mortgagee, who was put in possession, was to keep a certain portion of the yearly usufruct in lieu of interest, and this he was to continue to do, until the mortgagors came forward and paid off the principal in one sum. The mortgagee, after being in possession some years, voluntarily gave it up and brought a suit on his mortgage, for principal and interest. It was decided that so long as he received the specified sum from the usufruct, he had no right to complain, or to ask for his principal, until such time as the mortgagor chose to pay it off. It was, however, observed that if he had been dispossessed while

(c) S. D. A. 1860, v. 2, p. 38.

(e) 22 W. R. 44.

(d) Act VIII of 1859, Sec. 271.

(f) 3 N. W. P. 18.



any thing was yet due to him on the mortgage, he would have had a right to claim to be restored to the estate or to sue without further delay for the cash payment, whichever he preferred (g).

There was apparently a pure usufructuary mortgage, the agreement being that the mortgagee should have possession until payment: but the money was not paid, nor did the mortgagee get possession. He therefore brought a suit for possession, and for the interest of his money during the time he had been kept out. The Court ruled that the conditions of the deed shewed that the mode of payment selected and stipulated for by the parties was payment from the usufruct, and that the mortgagee's claim for interest was not in accordance with the terms of the deed, and must be rejected (h).

The question was raised whether a mortgagee by usufructuary conditional sale, who had never got possession of the property, could foreclose the mortgage, he having refused to accept a tender of the principal sum due, on the ground that he was also entitled to interest for the time during which the usufruct was withheld from him. The Court expressed an opinion, "that if he did not obtain the possession stipulated for, it was open to him to bring a suit to enforce fulfilment of the contract, but he was not at liberty to forego this right, and to demand interest in lieu thereof, contrary to the express terms of the contract" (i).

In like manner any deviation by the mortgagee from the terms of his contract, entitles the mortgagor at any time to have it cancelled and to pay off his debt.

A mortgage agreement, in the form of an usufructuary conditional sale, provided that certain arable and orchard lands, portion of the mortgaged property, should continue in the possession of the mortgagor. The mortgagee, during

(g) 3 N. W. P. 331.

(i) 8 N. W. P. 441.

(h) 3 N. W. P. 211.

the continuance of the mortgage term, took possession of some of the reserved orchard lands. It was held that this was such a breach as entitled the mortgagor at once, and without waiting for the day of payment originally agreed on, to cancel the mortgage contract and recover possession of the whole mortgaged property, on paying into Court the full amount of the loan. And his right to do so, was not affected by the fact that it was not expressly given to him by the mortgage deed (*j*).

A question of priority having arisen between two mortgagees,—the *second* claiming priority on the ground that with his mortgage he obtained possession of the title-deeds—the Madras High Court held that the non-possession of the title-deeds by the first mortgagee was a circumstance calling for explanation, but that if he could satisfy the Court that the absence of the title-deeds was reasonably accounted for to him at the time when he obtained his mortgage, or that he was subsequently induced to part with them upon such grounds and under such circumstances as to exonerate him from any serious imputation of negligence, his priority would not be lost because the mortgagor afterward dishonestly handed over the deeds to a second mortgagee (*k*).

If there are two mortgages of the same property, the first mortgagee if he purchases the right and title of the mortgagor, may still use his mortgage to protect himself against the second mortgagee (*l*).

If a prior mortgage is paid off, the debt to the mortgagee who is satisfied will be deemed to be extinguished, unless the prior mortgage is expressly kept on foot. There is no rule as to "tacking," such as is known to the English law (*m*). Thus where a second mortgagee paid off

(*j*) 10 N. W. P. 223.

(*k*) 4 Mad. 369.

(*l*) 7 Mad. 229.

(*m*) As to *tacking*, see Fisher's Law of Mortgage, 3d. Ed. pp. 599, 600. "A

prior legal mortgagee by annexing to his original security another which he holds for a subsequent debt, or an incumbrancer subsequent to the second, by getting in



the first mortgagee, but did not take an assignment of the first mortgage nor do any thing to keep it alive as a security against subsequent incumbrances created prior to the date of the second mortgage, it was held that these incumbrances had priority of the second mortgage (*n*).

There are several cases which are remarkable as showing that a mortgage may be in abeyance for a time, without its validity being affected. Thus, where the mortgage is of an usufructuary nature, and the Collector comes in and farms the land, not on account of any fault or mismanagement on the part of the mortgagee, the mortgage is, as respects the land, in abeyance during the Collector's possession, but will revive in full force when he gives it up again (*o*). So if a mortgagee purchases the remaining rights of the mortgagor, and his purchase is set aside on the ground of the mortgagor having previously disposed of those rights, the mortgagee's original title will revive in full force (*p*).

As the holder of a *zur-i-peshgee* lease has rights equivalent to those of a mortgagee, he has such an interest in the lands leased, that if execution be issued against that "interest," it must be sold according to the rules prescribed for the sale of realty, not according to those laid down for the sale of personalty (*q*).

According to English law, if the owner of two estates mortgage them both to one person, and then mortgage one of them to another person, without notice, the second mortgagee may insist, under the doctrine of marshalling, that the debt of the first shall be satisfied out of the estate not

a prior legal security may, under certain circumstances, postpone the rights of *mesne* incumbrancers until satisfaction of both the securities which have been thus united. This doctrine called *tacking* is applicable both to real and personal estate. It seems to be altogether contrary to any principle of equity, the essence of which is

equality; and it is in fact only founded upon the preference which in this country [England] is shown to legal titles."

(*) 5 B. L. R. 463. See 2 B. L. R. *ap.* 45.

(o) N. W. P. v. 7, p. 7; v. 8, p. 59; v. 10, p. 553.

(p) 9 N. W. P. 183.

(q) S. D. A. 1861, v. 1, p. 97.



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mortgaged to the second, so far as that will extend. As this rule is in principle equitable and just, it may no doubt be safely applied in this country also. But of course it will not be so applied as to prejudice the first mortgagee's right to recover principal, interest, and costs (*r*).

(*r*) See Fisher's Law of Mortgage, 3d. Ed. p. 704 &c: also 7 W. R. 483.

CHAPTER VIII.

OF REDEMPTION.

THE mortgagor, his heirs, and assignees to whom he has transferred his interest, are entitled to redeem a mortgage. But the right to do so, exists only up to the time of the lands being sold under decree of Court in satisfaction of the mortgagee's claim, or, where the mortgage is by way of conditional sale, until the mortgage has been finally foreclosed. And redemption can never take place, until a sum equal to the amount of the principal monies advanced, with interest at the rate stipulated for,—or if no rate has been stipulated for, at twelve per cent.,—has been received by, or tendered to the mortgagee. If the contract was entered into before Act XXVIII of 1855 came into force, it is not in any case necessary to pay or tender interest at a higher rate than twelve per cent. per annum.

The payment to the mortgagee of what is due to him, must come either from the usufruct of the property pledged, or from some of those persons in whom the right of redemption is vested: for the interest of the mortgagee in the land is inferior only to that of the mortgagor and his representatives, and if they do not redeem, the mortgagee need not allow any one else to do so. A mortgagee, therefore, is not bound to receive payment of the sum due to him, or to relinquish his lien, without having proof that the party offering to redeem is entitled to insist upon his



right to do so. And he may put any one who claims the right, to proof of his title, not being obliged to give up his mortgage tenure to a stranger. Thus, a person claiming to redeem on the ground of inheritance from the mortgagor, must prove that he really is the heir of the mortgagor, before he can succeed in his suit (a). "The mortgagee is not bound to *any* person who may start up with the allegation that he has succeeded to the rights of the original mortgagor. On the contrary, it is his duty as trustee for the mortgagor, to take the same care of the estate as he would of his own, and to admit no claims upon it until assured of the title of the claimant" (b).

And if the mortgagee rejects the tender of one not entitled to redeem, the mortgagor cannot afterwards claim any benefit from such tender, unless it was expressly made on his account. Thus, a creditor having obtained a decree against his debtor, wished to put it in force by attaching and selling certain lands belonging to the latter. But the lands being in the possession of a mortgagee by conditional sale, the decreeholder instead of attaching them deposited in Court what was due on the mortgage, and brought a suit for redemption, in which he was unsuccessful as it was held that he had no title to redeem. The mortgagor himself afterwards brought a suit for redemption, on the ground that the right to redeem (which would otherwise have been barred), had been kept alive by the money having been tendered by the decreeholder. The Court was of opinion, that the money so deposited could not be considered to be the money of the mortgagor, it not having been deposited on his account, or for his benefit in any way. It was not deposited with a view to save his estate from the conditional sale, but with the view of bringing it to an absolute sale by public auction, in satisfaction of the claims of the depositing party (c).

(a) 7 N. W. P. 45 : 1860, p.
120.

(b) S. D. A. 1859, p. 1273.
(c) 3 Sel. Rep. 54.



In this case, however, the deposit, if it had been made in the mortgagor's name and with his consent, would have been good, both as entitling the creditor to redeem, and as keeping alive the right of the mortgagor himself to do so. It would then have been the act of the mortgagor himself.

A person holding under the mortgagor,—as a mere *mokurreridar*—whose tenure has been created pending the mortgage, has no right of redemption (*d*).

Persons to whom the mortgagor has transferred his whole interest, that is to say, purchasers *out and out* of his equity of redemption, are entitled to redeem (*e*). It was however, apparently not so held formerly (*f*).

If a purchaser of the mortgagor's equity of redemption makes default in paying the purchase money or any portion of it, this does not necessarily invalidate the sale. In a suit brought by the purchaser to redeem, the mortgagee cannot avail himself of the objection that the full amount of the purchase money has not been paid, since his only right is to be satisfied that the person seeking to redeem is not a stranger, but one to whom the equity of redemption has been transferred by a *bond fide* sale (*g*).

A mortgagee by conditional sale can redeem one who has a prior simple mortgage of the same property (*h*). And where there was a simple mortgage and a subsequent mortgage by conditional sale, the first mortgagee having got a decree and having sold the property in execution, the Court held that the second mortgagee could have redeemed the first, and that not having done so, but having allowed the estate to be sold to satisfy the first mortgage, he had no claim as against the purchasers at the sale, and could not follow the lands in their hands (*i*).

(*d*) 17 W. R. 272. It would be otherwise by English law. See 2 Fisher's Law of Mortgage, 3rd Ed. p. 767.

(*e*) 3 W. R. 230 : 6 W. R. 230 : 11 W. R. 548 : 23 W. R. 25. 4 Agra, 30. S. D. A. 1853, p. 859. 9 N. W. P. 371, 421.

(*f*) S. D. A. 1847, p. 499. 6 N. W. P. 210.

(*g*) 4 Agra, 30.

(*h*) S. D. A. 1848, p. 305 : 1859, p. 1567. 4 W. R. 45.

(*i*) S. D. A. 1859, p. 1567. 4 W. R. 45. See Marsh. 191.

The Agra Sudder Court formerly held that no subsequent mortgagee had the right to redeem a prior mortgagee by conditional sale. The Court said that "the parties to a mortgage contract are mutually bound by their engagements to each other; and as the first mortgagee's contract was with his mortgagor, and with him only, or with his legal representative in which light the second mortgagee cannot be viewed, it is not competent to any third party to claim, or to the Courts to compel, a surrender of the tenure in whole or part, for which the first mortgagee is only answerable to the person from whom he received it, by payment of the amount of the mortgage loan. It equally follows, that the mortgagor is not at liberty to devolve the right of redemption to a third person, not a legal representative" (*j*). And the Calcutta Sudder Court appears to have come to the same conclusion (*k*).

But these decisions have been practically over-ruled (*l*). In a case in which there was a zur-i-peshgee lease for nine years, with a condition against alienation, and after the nine years had expired a second zur-i-peshgee lease was granted by the mortgagor to a third party,—it was held by the Agra High Court that the latter could sue to redeem the first lessee (*m*). "The nature of the original transaction was not such as to entitle the lender to say that the borrower was (and this even after the expiration of the lease) prohibited from dealing in good faith with a third person for the means of discharging the prior incumbrance: and if the new lease was made on the security of the land, (whether the security contracted for was like the former for a term of years, or of a higher nature) the transaction conferred such an interest in the land on the lender, as to entitle him to occupy the mortgagor's place for the purpose of maintaining a suit to redeem. To hold otherwise would

(*j*) 8 N. W. P. 304.

See 6 W. R. 230, 1 Agra F. B. 7.

(*k*) S. D. A. 1853, p. 859; 1856, p. 948.

See *ante* p. 123.

(*m*) 1 Agra F. B. 7.

(*l*) 3 W. R. 230; 23 W. R. 25.



lead in many cases to the infliction of grievous hardship on the mortgagor; for he may have been compelled to mortgage his estate at a time when the rate of interest was high, and subsequently be enabled to obtain a loan on easier terms; while the first mortgagee receiving his principal and interest in full, and having, as in the present case, been in possession during the whole term originally bargained for, would have received all that he could under any shadow of pretext lay claim to. The decisions, in those cases where the mortgage was by conditional sale, as to the persons who are properly to be deemed the 'legal representatives' of the mortgagor within the meaning of the Regulation, do not apply to a case like the present, even assuming that those decisions are not to be questioned. The lender has never dealt for any interest in the estate (beyond that which has already expired) save merely for the purpose of securing the repayment of the loan; if he is allowed to retain possession until he is fully repaid, he will have received all that he contracted for; and if he obtains this, we think he cannot justly be allowed to object that the person who seeks to redeem the property is not the borrower himself, but one who has acquired from the borrower an interest in the property sufficient, as we hold it to be, to authorize redemption. The reasoning in the cases quoted, and especially in the earliest case (15th May, 1853) is not satisfactory to us. The mortgage contract is there regarded as a contract strictly personal, between the mortgagor and the mortgagee, or at any rate personal to this extent, that the latter may object to the intervention of any third person unless such person fully represent the mortgagor by reason of his having acquired the whole remaining proprietary right and interest of the mortgagor in the land. Viewed as a security for obtaining the payment of a loan, the mortgage contract appears to confer no such right on the mortgagee, nor does it incapacitate the mortgagor from any other dealing (except in defeasance of the rights of the mortgagee) with the property."

To hold that a subsequent mortgagee has not the right of redeeming a prior mortgage by conditional sale, is in direct opposition to the principle which is the basis of the rule that a purchaser of the mortgagor's whole interest, has the same right of redemption that his vendor had. The estates of a mortgagee and of an absolute purchaser are alike, only that of the former is subject to be divested on the happening of certain events. A mortgagee is, in fact, the purchaser of the rights of the mortgagor: he buys them, but gives the mortgagor the chance of re-purchasing within a certain period. In England and in America, it has always been held that every person being a subsequent incumbrancer, or having a legal or equitable lien on premises already subject to a mortgage, may insist on a right to redeem on payment of the principal, interest, and costs due to the party redeemed, he who redeems being himself liable to be redeemed by those below him (*n*).

The refusal to recognise the right of a subsequent incumbrancer to redeem a prior mortgagee by conditional sale, probably arose from the principle being lost sight of, that the mortgage is merely a security for the debt and collateral to it, and that if the debt is paid by one who has an equity over the land, the mortgagee has got all that he had a right to, or that it was ever intended he should have (*o*). The transaction was treated by the Courts as one of absolute purchase to take effect on a certain day, but liable to become void in the event of payment by the mortgagor before that day. It was in fact dealt with as it was in olden times by the English Courts, before the present system of equity sprung up. The terms of the contract were followed literally; and as they contained no agreement for the re-payment to the mortgagee of the money advanced by him, it was considered that he looked to be repaid by getting possession of the property pledged,

(*n*) 2 Fisher's Law of Mortgages, 3rd Ed. p. 745. Story's Equity Pleading, ss. 185, 186, pp. 231, 232.

(*o*) See *Hunoomanpersad Panday's* case, 6 Moore 393.



and by that alone, and that he was entitled to the possession, except in the one event of the mortgagor paying him off strictly in the mode agreed upon.

A third party to whom the right has been expressly reserved in the mortgage deed, is entitled to redeem, as the mortgagor himself might have done (*p*).

But a person may by his own acts deprive himself of the right to redeem. A mortgagor presented a petition in Court, stating that he was unable to pay off his debt, and that he had put the mortgagee in possession as on foreclosure. The Court seems to have been of opinion that he was estopped by this proceeding, from afterwards redeeming; but that unless delivery of possession to the mortgagee were proved, there was nothing in what passed to bar the right of one claiming under an absolute purchase from the mortgagor (*q*).

Where the mortgage debt is by the mortgage contract payable on a date specified, the mortgagor cannot insist on a partial redemption of the property or on redeeming before the date agreed upon. If the mortgagee accepts payment of the principal or part of it before the date fixed, the terms on which the payment is made must be the subject of special arrangement between the parties. The mortgagor has no right of redemption unless the whole mortgage debt has been cleared off (*r*).

A mortgagor is not entitled to redeem any portion of the property pledged, without the whole debt being paid off. A mortgage transaction is one and indivisible, and the mortgagee has a lien over the whole estate, until the whole amount due to him has been paid.

Four villages were together mortgaged for a certain sum: the interest of the mortgagor in two of them was afterwards sold, and the purchaser sued to redeem these two, on payment of what he considered to be the proportion of the advance secured upon them. It was held, that

(*p*) 3 N. W. P. 187.

(*q*) S. D. A. 1849, 311.

(*r*) 20 W. R. 387.



the charge on the four villages could not be broken up, and that the mortgagee had a lien on the two, as on the four, for the whole mortgage debt (*s*).

Two mouzahs, each bearing a separate jumma, were mortgaged as a security for an advance of 2,000 rupees. The mortgagor then applied to the Revenue office for change of registry on behalf of the mortgagee, representing each mouzah to have been pledged for 1,000 rupees. Separate applications were necessary for each mouzah, by reason of their bearing separate jummas in the books. A few days afterwards, the mortgagee applied for registration in the usual form, making no mention of there being any separate advance or lien on *each* mouzah. The Collector, however, issued the usual notification in conformity with the specification of the mortgagor. But the Court nevertheless held that, as the deed conveyed a lien on both mouzahs for the entire loan, neither of them could be redeemed without payment of the whole of the debt (*t*). So, under one instrument (of zur-i-peshgee lease) lands were mortgaged to *A* and *B*, redeemable on paying Rs. 225 to *A*, and Rs. 275 to *B*: *A* and *B* took and held possession of the lands in moieties: and it was held that the mortgagor could redeem and recover possession of neither moiety without paying off the whole amount secured, *i. e.*, the Rs. 225 to *A*, and the Rs. 275 to *B* (*u*). So when the rights of the mortgagor have passed to two persons in certain shares, neither of these persons is entitled to redeem without paying off the whole debt (*v*).

But if the mortgage is of several different mouzahs and the deed specifies how much money is advanced on each particular mouzah, and there is a stipulation that each may be redeemed on paying off the amount due in respect of it, —in such a case of course the mortgagor may redeem piecemeal (*w*).

(*s*) S. D. A. 1851, p. 288: 1859,
p. 823.

(*t*) 8 N. W. P. 473.

(*u*) 22 W. R. 262.

(*v*) 6 W. R. 240. See also 3
W. R. (Misc.) 4: 7 W. R. 314.

(*w*) 23 W. R. 25.

A mortgagor may redeem part of the property pledged, if the debt for which the whole was mortgaged has been satisfied. Two mouzahs were mortgaged as security for one sum, and the equity of redemption in one of these mouzahs was afterwards sold. The purchaser was held to be entitled to sue to redeem the mouzah he had bought, on the ground that the whole mortgage debt had been paid off from the usufruct of the two : and this, although the other mouzah had several years before been sold by the mortgagor to the mortgagee (*x*).

A mortgage debt being indivisible, no one or more of several common mortgagors, nor the purchaser from any of them, is entitled to redeem until the whole mortgage debt is paid (*y*).

But when two or more persons, being co-sharers, join in making a common mortgage, any one of them may redeem the property mortgaged, on payment of the whole sum due. And so may the purchaser of the rights of one of several mortgagors (*z*).

The mortgagor who comes forward and redeems, obtains possession of the whole property, leaving it to the co-mortgagors who do not join in redeeming, to recover their shares from him, on paying their proportion of the mortgage debt and of the expenses incurred in redeeming (*a*). The joint mortgagors who redeem, have a lien on the property for the costs they have incurred in redeeming and getting possession. And there is no need for them to institute a suit to establish that lien (*b*).

The English law on this subject is similar to that prevailing here. If the equity of redemption be the property

(*x*) 10 N. W. P. 51. 1 Agra 3, 36 : 4 Agra, 33.

(*y*) 3 W. R. Misc. 4. S. D. A. 1858, p. 1460 : 1860. v. 1, p. 482. N. W. P. 1860, p. 84.

(*z*) 2 W. R. 150 : 7 W. R. 314. 1 Agra 36. N. W. P. v. 6, p. 328 :

v. 1, p. 81 ; and see the cases in next note.

(*a*) Sel. Rep. v. 3, p. 159 : v. 7, p. 53. N. W. P. v. 8, pp. 481, 518 ; v. 9, pp. 525, 543 ; v. 10, p. 378 ; v. 11, p. 77.

(*b*) 11 N. W. P. 77.

of several persons as joint tenants, or tenants in common, one of them may redeem : each as against an incumbrancer, and subject to account with his co-tenant, being entitled to possession and receipt of the whole rents (c).

There is a recent case which may seem to cast doubt on the right of one of several mortgagees to redeem the whole property mortgaged. It was there held that a tender of the amount due on the mortgage, by one or more of several mortgagors, is not a tender which a mortgagee is bound to accept unless made conjointly by the whole of the mortgagors or on their behalf and with their consent (d). But this decision cannot be supported if it goes further than to lay down that in a suit for redemption all the mortgagors—all those in whom the equity of redemption or any portion of it is vested—are necessary parties.

Though a mortgagee is entitled to say to each of several persons who have succeeded to the mortgagor's rights, that he shall not redeem a part of the property on payment of part of the debt, because the whole and every part of the land mortgaged is liable for the whole debt,—still a mortgagee who has by purchase acquired a part of the mortgagor's interest, cannot throw the whole burden of the mortgage debt on the remaining portion of the equity of redemption in the hands of one who has purchased it at a sale in execution of a decree against the mortgagor. Each has bought subject to a proportionate share of the burden, and must discharge it. Thus, there being a mortgage of sixteen villages, the mortgagor's equity of redemption was afterwards sold in lots in execution of decrees against him. The mortgagee became the purchaser (at these sales) of the mortgagor's interest in $12\frac{3}{4}$ ths out of the sixteen villages. The $3\frac{1}{4}$ villages remaining were sold in four separate lots to four different purchasers. The purchaser of one of these four lots was held to be entitled to

(c) 2 Fisher's Law of Mortgage
3rd Ed. p. 756.

Prannath Roy Chowdry's case, 7
Moore, 323.

(d) 21 W. R. 428. And see



redeem the village comprised in the lot purchased by him, upon paying such a sum as represented the portion of the mortgage debt chargeable on that village. But it was held that he could not insist on redeeming any village save that which he had himself purchased: and that the mortgagee if desirous of retaining possession of the other villages as mortgagee, was entitled to do so,—the right of the purchaser of one of the four lots being limited to the redemption and recovery of the village forming that lot (e).

So when two mouzahs were mortgaged together, and the equity of redemption in one was subsequently sold in execution of a decree held by a stranger, and was purchased by the mortgagee, and the equity of redemption in the other was in like manner sold under another decree and purchased by a third party, it was held that the latter might redeem the property he had purchased on paying a proportionate part of the mortgage debt (f).

When a sharer in a property mortgages not only his own share, but that of a co-sharer, without his consent, the latter should sue to have the mortgage set aside, so far as it regards his share. He ought not to sue to redeem; for by so doing, he admits that there is a valid mortgage of his share (g).

But although when a mortgage of an entire estate has been executed by several proprietors in one and the same transaction, an action by one proprietor to redeem his own peculiar share on paying his proportion of the loan, will generally not lie, yet it has been said that this rule is not without exception, and cases may occur, in which, for special reasons, its enforcement may not be considered proper (h).

(e) *Nawab Azimut Ali Khan v. Jowahir Sing*, 13 Moore, 404, 14 W. R. P. C. 17—varying the decree made by the Agra Court, reported 1 Agra, 3. See 24 W. R.

(f) 2 Agra, 88. See 1 Agra, 125. 2 All. 4. 15 B. L. R. 103. 24 W. R. 24.

(g) 9 N. W. P. 543.

(h) 8 N. W. P. 591.

The rule that one of several common mortgagors may redeem the whole estate, and that he cannot redeem his own share *only*, does not apply, when it appears clearly on the face of the mortgage deed that the mortgagors have each of them separate and distinct shares in the mortgage. In such a case they have no claim on the mortgagee beyond the interests which they have themselves recorded, and it would seem that each mortgagor must redeem his own share, and that there can be no success in a suit to redeem the whole property, unless all the parties to the contract join in it (*i*).

There can be no redemption after foreclosure has taken place ; for on foreclosure all the rights cease which the mortgagor had in the property pledged. And a suit for redemption instituted after foreclosure has been completed must fail, except when the foreclosure is successfully impeached and set aside.

A mortgagee executed an agreement to the effect that, if the mortgagor would consent to his obtaining a decree for foreclosure, he would afterwards restore the estate to him on certain conditions. He then brought a foreclosure suit, and the mortgagor allowed a decree to pass in his favor. But the mortgagor afterwards instituted a suit to redeem, as the mortgagee refused to fulfil his contract. The Court held that his suit must be dismissed. "If the mortgagor were minded to enforce any agreement whatever with respect to his property, it was indispensably necessary that he should have done so, before suffering the property to pass absolutely away from him. Having suppressed his agreement during the suit for foreclosure, he is not in a position to prefer any legal or equitable claim to benefit therefrom" (*j*). In such a case, however, if the mortgagor could prove distinct fraud on the part of the mortgagee he would doubtless be able to get the foreclosure set aside upon that ground.

(*i*) N. W. P. v. 5, p. 220 : v. 9, 314. See 7 Sel. Rep. 53.
 p. 543 : v. 10, p. 378. 7 W. R. (*j*) 5 N. W. P. 294.



It may happen that a mortgagee in possession is entitled to possession in more characters than one,—that he has some other title, as well as that of mortgagee. In such a case a suit for redemption will not lie.

A sum of money having been advanced for the payment of arrears of Government revenue due on a certain *puttee*, the lender was put in possession for five years as mortgagee. At the end of that period, a further sum was due for arrears, which the mortgagee paid up, obtaining a further mortgage for ten years. About the time when this second lease was granted, the Revenue officers were making a new settlement of the district, and they made it in respect of the mortgaged *puttee*, with the mortgagee and not with the mortgagor, the settlement being renewed with the mortgagee as farmer of the *puttee* for twenty years. A suit for redemption and recovery of possession was brought by the mortgagor at the date named as the end of the second lease, but it was held that, as the mortgagee then claimed not as mortgagee but as farmer under the settlement, a suit for redemption would not lie until the termination of his farm : the settlement, if bad, must first be set aside (*k*).

So, A who held from the Government a farming lease of B's lands, advanced a sum of money to him, and received as security for the debt a mortgage of the same property. By the terms of the mortgage contract, A was to have immediate possession and registry, and B was declared entitled to redeem after the expiration of ten years. At the close of that period, B sued to redeem and for possession ; but he failed, on the ground that A was in, not as mortgagee, but as Government lessee (*l*).

The mere settlement of a resumed *maafee* estate with the mortgagee, does not destroy the mortgagor's right to redeem, nor does it necessarily make the holding by the mortgagee a holding adverse to the mortgagor's right (*m*).

(*k*) 6 N. W. P. 176.

(*l*) 8 N. W. P. p. 59.

(*m*) 1 Agra, 224. See 1 Agra
15, 231.



Under the old law of limitation a mortgagor was never barred by mere lapse of time, from recovering his property, whether real or personal. The rule that suits were cognizable only within twelve years from the time when the cause of action arose, was applicable only when the possession of the occupant had been under a title *bond fide* believed to have conveyed a right of property to the possessor,—which the possession of a mortgagee never can be. The words of the old Regulation, which applied to deposits or pledges of money or other personal property, as well as to land, are:—"Provided that no length of time shall be considered to establish a prescriptive right of property, or to bar the cognizance of a suit for the recovery of property, in cases of mortgage or deposit, wherein the occupant of the land or other property may have acquired or held possession thereof as mortgagee or depository only, without any proprietary right: nor in any other case whatever, wherein the possession of the actual occupant, or of those from whom his occupancy may have been derived, shall not have been under a title *bond fide* believed to have conveyed a right of property to the possessor" (n). So that mere efflux of time would not, under the old law, of itself bar the right to redeem a mortgage (o).

And therefore, when, after a lapse of many years, the representative of the mortgagor sued to redeem, the fact that neither he, nor his father, nor his grandfather, all of whom in turn represented the original mortgagor, were ever in possession of the property, was held to be no ground of objection to his succeeding in his claim (p). But this applied only to the right to redeem: and if, after the mortgage debt had been in fact paid off from the usufruct, the mortgagor waited more than twelve years before advancing his claim to possession, he was not allowed wasilat,

(n) Reg. II. 1805, Sec. 3, cl. 4. 1135, 1273. 6 N. W. P. 203. 2

(o) W. R. Sp. 37. Sel. Rep. v. 1, Mad. 382.

p. 185: v. 2 p. 4. S. D. A. 1853, (p) 3 N. W. P. 187. See W.
p. 975: 1854, p. 400: 1859, pp. R. 1864, p. 68.



or mesne profits, except for the twelve years immediately preceding the institution of his suit,—in like manner as under similar circumstances, he could not claim the amount due on a bond, or the rent accrued on land (*q*).

It was only in a *mere* redemption suit that the mortgagor had the benefit of this exception to the ordinary rule of limitation. When a suit was brought to set aside a mortgage deed, it being denied by the alleged mortgagor that he ever gave a mortgage at all, the case was held not to come within the exception (*r*). And when a party had been admitted by the Revenue authorities to a settlement as proprietor under a *birt* title, it was held that a suit to redeem the land, on the ground that the title of the person so admitted to the settlement was really only that of mortgagee, must be brought within twelve years from the date of the order of the Revenue officers (*s*).

So where the original possession was admitted to have been as of mortgagees, but the mortgagees had at the settlement been entered on the register as zemindars, without any assertion of title on the part of the mortgagors, it was held that a redemption suit brought more than twelve years after such settlement, was barred: that it was in fact not a redemption suit, but a suit to reverse the settlement, which could not be reversed after such a lapse of time (*t*).

The soundness of these last two cases, however, is questionable (*u*). And it has been held that when a settlement of rent-free land was made with a mere mortgagee in his character of mortgagee, his possession, under the settlement, was not adverse to the mortgagors (*v*).

The law of limitation at present in force is to be found in Act IX of 1871, which applies to all suits for redemp-

(*q*) 4 N. W. P. 298. Sel. Rep.
v. 6, p. 261: v. 7, p. 182.

(*r*) S. D. A. 1859, p. 304, and
see p. 1273.

(*s*) 8 N. W. P. 136.

(*t*) 10 N. W. P. 443.

(*u*) See W. R. Sp. 37.

(*v*) 1 Agra, 15. See Agra, v. 1.
pp. 231, 324: v. 2, p. 8.



tion instituted on or after the first day of April 1873. It is in most respects similar in its provisions, so far as redemption is concerned, to Act XIV of 1859 which was applicable to suits instituted on or after the first of January 1862.

In suits against a mortgagee to recover possession of moveable or immoveable property which has been mortgaged, the period of limitation is—if the property be moveable, thirty years,—and if the property be immoveable, sixty years. The time runs from the date of the mortgage, unless when an acknowledgment of the title of the mortgagor or of his right of redemption has before the expiration of the prescribed period been made in writing signed by the mortgagee or some person claiming under him. When there has been such an acknowledgment, then the time begins to run from the date of the acknowledgment. An exception is made as to mortgages of immoveable property in British Burma executed before the first of May 1863: and claims to redeem such mortgages are governed by the rules of limitation in force in that province immediately before the first of May 1863 (*w*).

An acknowledgment, in order to prevent the right of redemption being barred, must be signed before the claim has become barred by the lapse of the prescribed period (*x*). And the signature must be that of the mortgagee himself. In one case, the mortgagor in 1846 sued to redeem, and the mortgagee successfully resisted the claim. Many years afterwards another suit was brought by the mortgagor's representatives, to recover possession. It was contended that an acknowledgment within the meaning of cl. 15 of Sec. 1 of Act XIV of 1859 saved the suit from being barred. The acknowledgment relied on was said to be contained in two documents,—a mookhtar-nama to a person to appear (for the mortgagee) and defend

(*w*) Act IX of 1871, Sch. II. sec. 1, cl. 15.
Arts. 147, 148. Act XIV of 1859, (*x*) *Ibid.* and see 6 Mad. 138.



the suit in 1846, and a written statement filed by that person in that suit, which written statement contained an acknowledgment of the title of the mortgagor and of his right to redeem. The Privy Council held it was impossible to put the two documents together so as to satisfy the requirements of the Act, and added,—“It was argued that the signature of an agent was sufficient and that the mokhtar being authorised to defend the suit and to use such arguments as he thought fit, authority was given to him to make an acknowledgment of title, and that such an acknowledgment having been made and signed by him, the Statute was complied with. Their Lordships think that is not so. The Statute must receive a construction according to its plain words. It requires the signature of the party himself, namely, the mortgagee: and it would be a wrong construction of it to hold that any other signature would satisfy these words” (y).

An acknowledgment may be sufficient though made to one who is not the mortgagor and who is not himself entitled to the mortgaged property. Thus when the mortgagees had attested as correct the “record of rights” prepared at a settlement with them of an estate, in which they were described as mortgagees, but which did not mention the name of the mortgagor, this was held to be an acknowledgment by the mortgagees of the mortgagor’s right to redeem within the meaning of Article 148 of Schedule II (z).

So long as the suit is brought strictly within the prescribed period of limitation, the laches of the mortgagor is immaterial. The laches of the parties cannot estop them from asserting their right, if it exists. “The question is one of title, and the right to assert that title is to be determined by the law of limitation as it stands. The

(y) *Luchmee Buksh Roy v. Runjeet Ram Panday*, 13 B. L. R. 177 (P. C.).

3 W. R. 3 (under Act XIV, of 1859): 6 Mad. 267. And see 5. Mad. 320.

(z) 1 I. L. R. All. 117. See

law, wisely or unwisely, has given to the mortgagors the long period of sixty years within which to bring their suit: and no Court of Justice would be justified in diminishing that period on the ground of the laches of a party in the prosecution of his rights" (a).

A suit for the redemption of an usufructuary mortgage falls within the sixty years limitation,—although (as is always the case in such mortgages) the possession of the mortgagee until payment of the debt is consistent with the original intention of the parties. In one case it was contended that a limitation which ran from the date of the mortgage could not apply to an usufructuary mortgage. The Privy Council held that the rule of limitation was enacted in the most general terms and in language sufficiently large to embrace every kind of mortgage. "There can be no doubt it was deliberately done, and that the provision found in the 4th cl. of Sec. 3 of Reg. II of 1805 which excluded cases of mortgages or deposit from the Regulations relating to limitation was designedly set aside,—a different policy prevailing with those by whom" Act XIV of 1859 was passed (b).

The sixty years' rule applies only to suits for recovery of possession of the property. Where a mortgagor, after the mortgage has been satisfied, sues for surplus collections received by the mortgagee, the suit is governed by the six years' rule of limitation prescribed by clause 16 of section 1 of Act XIV of 1859: for after the mortgage has been satisfied, the mortgagee cannot be considered to be in the position of a trustee for the mortgagor, within the meaning of section 2 (c).

When a mortgagee in possession has endeavoured by litigation to establish an absolute title in himself inconsistent with the mortgage, and has failed, his possession during the litigation, although extending over a period

(a) *Juggurnath Sahoo's case*, 2 13 B. L. R. 177, (P. C.).
 L. R. I. A. 48, 14 B. L. R. 386. (c) 9 W. R. 187 (F. B.).
 (b) *Luchmee Buksh Roy's case*



of more than twelve years, cannot be deemed adverse to the mortgagor (*d*).

The sixty years' rule does not apply when the relationship of mortgagor and mortgagee has been materially altered, or has ceased to exist. Thus when notice of foreclosure has once been duly served, the suit of the mortgagor seeking to redeem on the ground that the mortgage debt was paid off before the end of the year of grace, must be brought within twelve years from the expiry of the year of grace (*e*).

A mortgagee in possession who purchased the mortgaged property at an auction sale for arrears of revenue, which sale was not caused by any fraud or misconduct on the part of the mortgagee, was held to have acquired a new title, so that if the mortgagor desired to dispute it, it was necessary for him to institute his suit within twelve years from the sale (*f*).

The guardian of certain minors having mortgaged an estate belonging to them and put the mortgagee in possession, subsequently sold the estate out and out to the mortgagee. On a suit being brought by the minors to set aside the sale as not binding upon them, it was held that a separate and distinct cause of action accrued on the sale, and that limitation was not to be reckoned from the date of the mortgage (*g*).

When a decree for redemption is obtained but is not executed within the three years prescribed by section 20 of Act XIV of 1859, for the execution of decrees, a fresh suit for possession on redemption will lie. The mortgagee does not cease to be a mere mortgagee, simply because the mortgagor omits to execute his first decree (*h*).

A suit to recover possession of immoveable property conveyed in trust, or mortgaged, and afterwards purchased

(*d*) 3 Mad. 137.

(*e*) 8 W. R. 476. See S. D. A.
1854, p. 137 : 1859, p. 1494 : 1861,
v. 1, p. 8.

(*f*) 2 Hay, 475. See *ante*, pp.

115, 116.

(*g*) 1 Agra, 180.

(*h*) 2 Agra, 256.



from the trustee or mortgagee in good faith and for value is, under the present law, barred after twelve years,—the period beginning to run from the date of the purchase (i). And so is a suit to recover moveable property conveyed in trust, deposited, or pawned, and afterwards bought from the trustee, depositary, or pawnee, in good faith and for value (j).

Dealing with the corresponding sections of Act XIV of 1859 (k) it has been held that one who under these provisions resists the claim of a mortgagor to redeem, must prove that he is a purchaser within the proper meaning of the term,—that he is a *bonâ fide* purchaser,—and that he is a purchaser for valuable consideration. And a *bonâ fide* purchaser is one who purchases that which is *de facto* a mortgage, or subject to a trust, upon a representation made to him, and in full belief that it is not a mortgage, or subject to a trust, but an absolute title (l). The provisions of Sec. 5 of Act XIV of 1859 are of an extremely stringent kind. "They take away and cut down the title which *ex hypothesi* is a good title of the cestui que trust, or of a person who has deposited, pawned or mortgaged property : they cut down that title in regard to the number of years that the person would have had a right to assert it : from a very great length of time, sixty years, they cut it down to twelve years. It is therefore only proper that any person claiming the benefit of this section should clearly and distinctly shew that he fills the position of the person contemplated by this section as the person who ought to be protected" (m).

The manner in which redemption is carried out, varies according to the nature of the mortgage. But in all cases, the redemption is complete on the payment or tender to

(i) Act IX of 1871, Sch. II, Art. 134.

(j) *Ibid.* Art. 133.

(k) Sec. 1, cl. 12, and sec. 5.

(l) *Radhanath Doss v. Elliott*, 14 Moore 1, 6 B. L. R. 503.

(m) 14 Moore 15 : approved and followed in *Juggurnath Sahoo v. Syud Shah Mahomed Hossein* 2 L. R. I. A. 48, 14 B. L. R. 386. See 1 L. R. Bom. 269.



the mortgagee, or the deposit in Court, so long as the right of redemption is in existence, of the sum on payment of which the mortgage is by the contract declared to be redeemable.

A mortgage deed provided that certain lands should remain in the possession of the mortgagee, until the principal sum lent should be paid down. The mortgagee having entered on possession and collected an amount equal to the principal (without any interest), the mortgagor sued to redeem, contending that as the deed was silent on the subject of interest, the mortgagee had got all that he was entitled to. It was held that he was not in a position to redeem, and in delivering judgment, the Court said,—“We find that the lands were by the deed to remain in possession of the mortgagee until the principal sum lent should be paid down. This, therefore, in our opinion, clearly implies that the usufruct was intended in lieu of interest, and the land redeemable on payment of the money lent. A mortgagor is under the law entitled to recover possession when the debt is satisfied, principal and legal interest, from the usufruct, or the mortgaged lands can be redeemed by deposit of the principal, and an account taken afterwards of the receipts during the mortgagee's possession. The special appellant in this case (the mortgagor) has not become entitled under either of these conditions” (n).

A mortgage deed, and a separate deed relating to the same transaction, contained stipulations for the annual payment to the mortgagor by the mortgagee, who was to have possession, of a certain sum for *nankar* and *seer*. The mortgagor sued to redeem, and stated in his plaint that he meant to bring a separate suit for arrears of the *nankar* and *seer*. It was ruled, that he was not obliged to include his claim for these arrears in the redemption suit, and that there was no such splitting of demands, as rendered him liable to a nonsuit (o). In another case it was held that the mortgagor was right in including a

(n) 2 Hay, 150.

(o) 9 N. W. P. 465.



claim for arrears of *nankar* in a redemption suit, in which a general account was demanded (*p*).

A mortgagee got possession of certain lands not included in his mortgage. The mortgagor afterwards sued to redeem, not mentioning these lands. He then brought another suit for possession of them : and it was held that this was no splitting of claims, and that the cause of action was not *one* (*q*).

A mortgagee having fraudulently excluded part of the mortgaged property from the rent roll, and entered it as rent-free, the mortgagor rightly included in his redemption suit, a prayer that this might be corrected, and that the mortgagee might be charged with the rent which ought not to have been relinquished (*r*).

In a redemption suit, the mortgagee kept back the original mortgage deed, and produced one which turned out to be a forgery. It was held that the Court should have gone on with the case, and decided it upon secondary evidence produced by the mortgagor of what the terms of the contract were (*s*).

The tender or deposit must be of money, and the lender is not bound to accept of a *teep*, bond, or bill, instead of cash. However, if he does accept such a mode of payment, he cannot afterwards repudiate his acceptance.

But a strict compliance with the terms of his agreement, is all that is required of the mortgagor (*t*). Therefore, a tender or deposit not made in cash, is good, if it was the intention of the parties, at the time of contracting, that a payment or tender so made should be sufficient. Where it appeared to be in accordance with the original intention of the parties, certain sums due from the mortgagee were allowed to be deducted by the mortgagor from his debt, and a tender of Company's paper the nominal value of which amounted to the debt so reduced, was held a suffic-

(*p*) 9 N. W. P. 522.

(*q*) 9 N. W. P. 425.

(*r*) 9 N. W. P. 525.

(*s*) 10 N. W. P. 69.

(*t*) See 11 N. W. P. 147 : 2
Agra, 163.



gent tender, without reference to the selling price of the paper,—the mortgagors having shown to the satisfaction of the Court, that they offered to pay all that was justly due at the date of making the tender, and in the mode contemplated by the lender (*u*).

So, when the mortgage deed stipulates that the mortgagor shall be entitled to redeem on paying the principal, a tender of the principal alone is sufficient: and any claim which the mortgagee may have for interest, or for other matters arising out of the mortgage transaction, must be enforced by him in a separate suit against the mortgagor: nor can the mortgagee, on the ground of any such claim, oppose the mortgagor's right of redemption (*v*).

Lands were mortgaged as being *lakhiraj*, and the mortgagee was put in possession, the agreement being that the profits should be taken in lieu of interest. Subsequently the lands were resumed, and revenue was assessed upon them. The mortgagee in possession paid certain sums on account of revenue. The mortgagor sued to redeem, depositing in Court only the principal sum borrowed by him. It was held that the deposit was sufficient to save his right to redeem, but that he was not entitled to recover possession of the land until he had also paid into Court the amount which the mortgagee had paid for revenue, with interest (*w*). In another case, however, it was held under similar circumstances, that the mortgagee had a lien on the land for the sums paid by him for revenue, and that the mortgagor was not entitled to redeem on tender of merely the principal monies due on the mortgage (*x*).

If a good and sufficient tender is made, but is rejected by the mortgagee, he is not entitled to any interest after the date of the tender,—and if he is in possession of the land, he is accountable for the proceeds from that

(*u*) 8 N. W. P. 447.

(*w*) 3 W. R. 174.

(*v*) 8 N. W. P. 441. See S. D.

(*x*) 8 W. R. 6. See 3 W. R. 162.

A. 1859, p. 144.



date, such proceeds being estimated according to the gross *jumma bundee*. All his rights under the mortgage contract are in fact at an end, on a proper tender being made (*y*).

Under Act VIII of 1859 if the suit be for land situate within the limits of a single district, but within the jurisdiction of different Courts, the suit may be brought in a Court within whose jurisdiction any part of the land lies, if the claim in respect of the value of the land, be cognizable by the Court: but the Court in which the suit is brought must apply to the District Court for authority to proceed with the same. If the property lie in different districts, the suit may be brought in any Court otherwise competent to try it, within the jurisdiction of which any portion of the land is situate, but in such case the Court in which the suit is brought must apply to the High Court for authority to proceed with the same; and if the application is made by a Court subordinate to a District Court, it must be submitted through that District Court (*z*). If the property lie in Districts subject to different High Courts, the application is to be made to the High Court to which the District in which the suit is brought is subject, and such High Court with the concurrence of the High Court to which the other District is subject, may give authority to proceed with the same (*a*).

Under the new Civil Procedure Code which has operation from the 1st of October 1877, suits for the redemption of a mortgage of immoveable property, or for the determination of any other right to or interest in immoveable property, must be instituted in the Court within the local limits of whose jurisdiction the property is situate. If the property be situate within the limits of a single district but within the jurisdiction of different Courts, the suit may be instituted in the Court within whose jurisdiction any por-

(*y*) 9 N. W. P. 1.

(*a*) *Ibid*, Sec. 13. See sec. 14.

(*z*) Act VIII of 1859. Secs. 11, 12.



tion of the property is situate,—provided that, in respect of value, the entire claim be cognizable by such Court. If the immoveable property be situate within the limits of different districts, the suit may be instituted in any Court otherwise competent to try it within whose jurisdiction any portion of the property is situate (b).

I. As to the redemption of pure usufructuary mortgages.

When the mortgage contract was entered into previous to the passing of Act XXVIII of 1855.

The general custom in former times seems to have been that the usufruct of the mortgaged property, however lucrative it might be, should be taken in lieu of interest, and that there should be no redemption until payment or tender of the principal in full (c). Since the 28th of March 1780, however, the usufructuary mortgagee is confined to interest at twelve per cent. per annum, or at any lower rate which may have been agreed upon, and whatever sums are received from the land in excess of such interest, are applied to the reduction of the principal.

By Regulation XV of 1793, section 10, it is enacted :—
“ In cases of mortgages of real property, executed prior to the twenty-eighth day of March one thousand seven hundred and eighty, in which the mortgagee may have had the usufruct of the mortgaged property, whether he shall have held it in his own possession or not, the usufruct is to be allowed to the mortgagee, in lieu of interest, agreeably to the former custom of the country (provided it shall have been so stipulated between the parties), until the abovementioned date, subsequent to which, the same interest is to be allowed on such mortgage bonds, and also on all bonds for the mortgage of real property, which have been entered into on or since that date, or that may be

(b) Act X of 1877, secs. 16, 19 : *suing.*

and see the other sections of chapter 2 of that Act, as to the place of

(c) See Reg. XV. 1793, s. 10.

hereafter executed, as is allowed on other bonds which have been or may be granted on or posterior to such date, and no more; and all such mortgages are to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum with the simple interest due upon it shall have been realized from the usufruct of the mortgaged property subsequent to the twenty-eighth day of March one thousand seven hundred and eighty, or otherwise liquidated by the mortgagor" (d).

All such mortgages are, therefore, to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum with the simple interest due upon it, at any rate agreed upon not exceeding twelve per cent. per annum, shall have been realised from the usufruct of the property or otherwise.

In a suit (e) to redeem an usufructuary mortgage, the principal deed contained an agreement to pay interest at the rate of nine per cent. per annum. But there were two other transactions (the whole three forming one mortgage) by which the result was to secure to the mortgagee interest at a rate considerably above twelve per cent. There was much discussion as to the rate of interest which the Courts ought to allow, and as to whether Sections 8 and 9 (the penal sections) of Reg. XV of 1793 were applicable. The Sudder Court held that the only rate "stipulated" for was the nine per cent. expressed in the principal deed, and that therefore they were bound by Sec. 5 of the Regulation to give interest at that rate only. The Privy Council held that as the suit was by the mortgagor for redemption (and not by the mortgagee seeking to enforce his usurious contract) the penal sections 8 and 9 did not apply: that although nine per cent. was the only rate expressed, it was not the rate really "stipulated" between the parties,—and

(d) Reg. XV. 1793, Sec. 10: Reg. XVII. 1806, Sec. 5: Reg. XXXIV. 1803, Sec. 9. All of these are repealed by Act XXVIII

of 1855, as to contracts entered into since the passing of that Act.

(e) *Shah Mukhun Lall v. Baboo Sreekishen Sing* 12 Moore, 157.



that the usurious rate stated by the mortgagor and proved, was the real rate "stipulated between the parties:" and therefore that the Court was not bound to award only nine per cent., but should under the circumstances have awarded twelve per cent. Referring to Sec. 10 of Reg. XV of 1793 their Lordships say: "At the time when this Regulation was passed, the receipt of profits in lieu of interest under a simple usufruct mortgage was common, as indeed appears by the introductory words of the clause. As to mortgages executed before the 28th of March 1780, the usufruct might be allowed, even after the Regulation, in lieu of interest up to that date. Then, after that date, that dividing point of time, and subsequently to it, the character of these mortgages suffered a change. The mortgage possession, instead of enduring by title for the stipulated time, was made liable to abridgement by satisfaction from the usufruct, and a claim to interest arose in some cases where it did not exist before. The perception of the profits in many cases did not constitute receipt of interest, but was in lieu of any. Then, as to all usufructuary mortgages to be made after the dividing time which was before the Regulation, it makes also provision, and subjects alike all the enumerated mortgages, to cancellation and redemption whenever the principal sum, 'with the simple interest due upon it,' shall have been realized from the usufruct of the property subsequent to the 28th day of March 1780, or otherwise liquidated by the mortgagor. It applies then, to all alike, though the circumstances of them all were not originally similar,—subjects them to one provision, and imposes interest in some cases where there was no contract for it before. This section, having so provided, drops designedly the words 'stipulated' and 'specified' which would have been inappropriate in many of the cases, and uses, in more correct language, this expression: 'the simple interest due upon it.' This simple interest would of course, in all cases where no interest was named, be twelve per cent.; but where a higher rate was

named, against which the usufruct was to be a set-off,—that is, a receipt ‘in lieu’ of it,—the reduced rate would be twelve per cent., and all interest alike would be ‘due’ by force of the enactment, even where interest did not exist before; therefore, as this is the case of an usufructuary mortgage, by means of which a profit higher than the return of twelve per cent. was to be made, and as relief is sought, *viz.* to have the pledge restored as cancelled or redeemed by satisfaction of the usufruct, the clause which is most closely applicable to the claim is the tenth section, the terms of which are large enough to embrace, and were designed, in fact, to embrace, some cases where the law itself made the interest ‘due.’ The Regulation, then, rather seems to favour than prohibit the restoration of the pledge on the Court terms, that is, on reduced terms of interest imposed by the law. The real transaction appearing, and no prohibitory law intervening, the Court is left free to do justice in the particular case, and if the spirit of the tenth section regulate the case, it will sanction a redemption at the higher rate, allowing the actual contract so far as the law allows it” (*f*).

The same rule applies to *zur-i-peshgee* leases, which as has been seen already are considered to be of the nature of pure usufructuary mortgages, and are therefore subject to the rules which govern them (*g*). In one case, in which the mortgagee held on after the end of his lease, his debt not being fully paid off, the Court decided that the mortgagor in order to entitle him to possession, must proceed regularly after the whole amount of the debt had been realised from the property,—and that this would be so, whether the original term of the lease had expired or not (*h*).

(*f*) *Shah Mukhun Lall v. Baboo Sreekishen Sing*, 12 Moore 157 (190).

(*g*) *Supra* p. 8. See S. D. A. 1859, p. 1566; 1860, v. 2, p. 174:

1862, p. 57. 2 Hay, p. 159. Marsh. p. 112, W. R. Sp. p. 38: 3 W. R. pp. 6, 162, 174.

(*h*) S. D. A. 1860, v. 1, p. 364.



All proceedings under Regulation XV of 1793, Section 10, must be taken by way of regular suit, and there is no provision for disposing summarily of cases which fall within its scope (*i*). The only point to be determined in such suits is, whether the mortgage debt has been satisfied in full. In *Nawab Azimut Ali Khan's* case (*j*) the Privy Council said: "According to the course and practice of the Courts in India, the only point to be determined in such a suit is whether the mortgage debt has been fully satisfied after taking into account the sum tendered or deposited: nor is the finding of any particular amount as still due conclusive against the mortgagee in a subsequent suit." This rule however—which certainly operates harshly and has a tendency to expose the parties to needless litigation and expense—has scarcely been followed by the Courts here in some of the more recent cases. Thus in 1872 the late Chief Justice (*k*) said,—“The suit is in reality, in our opinion, a suit between the mortgagor and the mortgagee for an adjustment of the account between them. If upon taking the account it appears that the mortgagee has been fully satisfied, the plaintiff, the mortgagor, is entitled to have back the property, and the Court would make a decree for that purpose; but we think that the question in the suit is not simply whether the plaintiff is entitled to have the property back, and that, the Court being a Court of equity and acting upon the principle that it is always the aim of a Court of equity to fully determine as far as possible all questions concerning the subject of the suit, the account should be taken up to the time of the decree, and the account so taken should be considered to be binding, and the parties should not be at liberty, except under peculiar circumstances, to reopen it in another suit.

(*i*) Cons. 277, 9th July 1817: June 1870). See Marsh. 112, W. Cons. 830, W. C., 20th Sept. Cal. R. Sp. 38, dissented from in 18 W. C., 18th Oct. 1833. See S. D. A. R. 65.
1860, v. 1, pp. 383, 390.

(*k*) Sir R. Couch.

(*j*) 13 Moore 412, (decided in



Therefore, in the present case, we think we must deal with the suit as one for the adjustment of the account to be followed by a decree according to what shall appear, on taking the account, to be the right either of the plaintiff or the defendant" (l).

It has been held that nothing can ever deprive the mortgagor of his right to have the accounts of the mortgagee in possession taken, not even an admission in his plaint that some thing may possibly still be due on the mortgage (m). And the mortgagor is not bound to prove, in the first instance and independently of the taking of the accounts, that the mortgage debt has been paid off (n) : but if he fails eventually to prove that it has been satisfied, his suit will be dismissed with costs (o) : and the *onus* is on him to prove that the mortgagee in possession has been paid in full by perception of the profits (p).

A condition in a mortgage deed that the mortgagor shall not claim an account from the mortgagee who has been in possession, does not in any degree bar the operation of the law by which the lender is to account to the borrower for the proceeds during his possession (q). As a general rule, the mortgagee may be called on by the mortgagor to account at any time, on the mortgagor's allegation that the whole sum due, with interest, has been received by him. And it has been held, that the mere fact that the term mentioned as that during which a *zur-i-peshgee* lease is to continue in force, has not yet elapsed,—or even a special agreement that the mortgagee shall

(l) 18 W. R. 65. So 22 W. R. 172, 269: 24 W. R. 275. In none of these cases was the decision of the Privy Council in *Nawab Azimut Ali Khan's* case referred to.

(m) 9 N. W. P. 371. S. D. A. 1858, p. 1691: 1859, p. 1076. But see in the case of an usufructuary conditional sale, *Forbes v. Ameeeroonissa*, 10 Moore 340, 5 W.

R. P. C. 47.

(n) S. D. A. 1855, p. 432: 1859, p. 5.

(o) 11 N. W. P. 3.

(p) *Shah Mukhun Lall v. Baboo Sreekishen Sing* 12 Moore, 157.

(q) 6 W. R. 6: S. D. A. 1851, p. 632: 1859, p. 1076. 10 N. W. P. 51, 198. See *supra*, p. 74.



remain in possession until payment of the debt is made in one sum,—does not prevent the mortgage from being at an end whenever the mortgagee has received both principal and interest (*r*).

But in the case of a *zur-i-peshgee* lease or other mortgage made after the passing of Act XXVIII of 1855, all depends upon the terms of the contract. And if it is clearly the intention that the mortgagee shall under all circumstances have possession up to a fixed date, the mortgagor cannot redeem prior to that date (*s*).

The mortgagor must be careful not to oust the mortgagee within the period during which he is entitled to remain in possession, unless he is prepared to show, beyond doubt, that the debt has been fully paid off. If he does oust the mortgagee too soon, he renders himself personally liable to an action for the balance then due, the mortgagee being no longer restricted to his claim for possession (*t*).

A mortgagee was in possession, the contract being that out of the usufruct he should keep a certain sum by way of interest and that, if the usufruct was insufficient, the mortgagor would make up the deficiency in the interest. The mortgagor tendered the principal, and took possession, forcibly ejecting the mortgagee. The latter thereupon brought a regular suit to recover possession. It was held that the principal having been tendered to the mortgagee, the *onus* lay upon him to produce his accounts and prove that something still remained due to him for interest (*u*).

A mortgagee to whom the usufruct was given in lieu of interest, was in possession. A purchaser of the mortgagor's right of redemption sued to redeem, offering to bring the principal into Court, which the Court wrongly

(*r*) *Shah Mukhun Lal's case* 12 25 W. R. 10; 3 Mad. 363; 8 Moore, 157, 6 W. R. G. S. D. A. Mad. 31; S.D.A. 1860, v. 2 p. 1852, pp. 280, 304; 1862, p. 57. 208.

5 N. W. P. 266.

(*t*) S. D. A. 1853, p. 59.

(*s*) See 6 B. L. R. 562, and the cases there referred to. See also

(*u*) 19 W. R. 429.

refused to allow him to do. It was held that it was not necessary to prove that the mortgage debt had been tendered to the mortgagee out of Court, and that the question whether the purchaser had or had not tendered the money to the mortgagee before he sued, was one which only affected the right of the purchaser to recover his costs. If the purchaser proved that he had offered the money to the mortgagee out of Court, he would be entitled to recover the property and to get his costs of suit, as well as the proceeds recovered by the mortgagee in excess of the interest at twelve per cent. and the costs of collection ; and if the purchaser failed to prove the previous tender, he would still be entitled to recover possession, on depositing the money within a certain time to be named in the decree,—but that in the latter case, he would not get any costs of suit (v).

The purchaser of a mortgagor's interest, with full notice of the mortgage, ousted the mortgagee in possession, denying that there ever was a mortgage. It was held that being a wrong-doer in ousting the mortgagee, he could not insist on the mortgagee rendering his accounts under Sec. 2 of Reg. XV of 1793 : that he would be personally liable in a suit for damages for ousting the mortgagee, but that he was not *personally* liable for the mortgage debt merely as representing the mortgagor in the lands pledged (w).

When the mortgage contract has been entered into subsequent to the passing of Act XXVIII of 1855.

The repeal of the usury laws created a great change in the position of usufructuary mortgages ; and agreements made since it took place, can be strictly enforced even although such as to give interest to the mortgagee at a higher rate than twelve per cent. per annum. For a mortgage or other contract for the loan of money, whereby it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, is binding upon the parties (x).

(v) 3 W. R. 128.

(x) Act XXVIII of 1855, sec. 4.

(w) S. D. A. 1859, p. 1181.



Whenever (y) a deposit may be made of the principal sum and interest due upon any mortgage or conditional sale of land, the amount of interest to be deposited shall be at the rate stipulated in the contract, or if no rate has been stipulated and interest be payable under the terms of the contract, at the rate of twelve per cent. per annum; provided, that in the latter case the amount deposited shall be subject to the decision of the Court as to the rate at which interest shall be calculated. And (z) in any case in which an adjustment of accounts may become necessary between the lender and the borrower of money upon any mortgage or conditional sale of landed property, or other contract whatsoever, entered into after the passing of the Act, *interest is to be calculated at the rate stipulated therein.* If no rate of interest shall have been stipulated, and interest be payable under the terms of the contract, it shall be calculated at such rate as the Court shall deem reasonable (a).

The effect of the change is simply to bind parties strictly by the terms of the contract they have made. When the agreement is that the usufruct is to be taken in lieu of interest, the mortgagee will not be liable to account, however large his receipts may be: he will be entitled to continue in possession, until the principal is paid to him (b). If there is no mention of interest at all, it will be for the Court to say whether any is to be allowed, and at what rate. If any rate is mentioned, it will be calculated at that

(y) Sec. 5.

(z) Sec. 6.

(a) So far as they affect contracts entered into since the passing of Act XXVIII of 1855, the following sections are repealed. Regulation XV of 1793, secs. 4, 6, 7, 8, 9, 10, 11: Regulation XXXIV of 1803, secs. 3, 5, 6, 7, 8, 9, 10: Regulation VIII of 1805, sec. 23,

cl. 1, so far as it extends the application of the above mentioned sections of Regulation XXXIV of 1803: Regulation XIV of 1805, sec. 9, cls. 3, 4, 5, 6, and so much of sec. 11 as bears on the subject of usury: Regulation VII of 1806, sec. 2 so far as it bears on the subject, and secs. 4 and 6.

(b) See 6 W. R. 283.

rate whatever it may be. In the two latter cases the mortgagee will be liable to account, but he will have to account only on the strict terms of his agreement.

II. As to the redemption of simple mortgages. The regulations lay down no particular rule as to the redemption of simple mortgages. In such cases, the mortgagor has merely to tender the whole balance due to the mortgagee for principal and interest, and may then require the mortgage deed to be delivered up. He must take care to provide himself with the means of proving his having made the tender: and if the tender is sufficient but is not accepted, he may bring a suit to have the mortgage deed cancelled, he offering to pay whatever is really due. A deed of mortgage is in fact of no effect after a tender has been made, and all its conditions and stipulations cease from that date: and therefore, when a proper tender has been made and rejected, the mortgagee ought not to be allowed any interest after the date on which it was made, and the costs of the redemption suit consequent on such rejection, should be thrown on him (c).

Simple mortgages where the mortgagee has been in possession, are redeemable in like manner as are pure usufructuary mortgages; and the mortgagor is not entitled to the summary procedure provided by Sec. 2, Reg. I. 1798, which refers to mortgages by conditional sale only (d). As in pure usufructuary mortgages, the liabilities and position of the parties will depend very much on the question whether the contract was entered into before, or after the passing of Act XXVIII of 1855.

But a simple mortgage, whether usufructuary or not, can be redeemed, only previous to the mortgagee's bringing a suit for his money and having the property sold under decree in satisfaction of his claim. On the land being so sold, the mortgage is of course at an end, and there can no longer be any redemption.

(c) 9 N. W. P. 1.

See S. D. A. 1860, v. 1, p. 390.

(d) S. D. A. 1860, v. 1, p. 383.



III. As to the redemption of mortgages by conditional sale, bye-bil-wufa, or kut-kubala. When the mortgagee has not had possession of the land, the mortgagor may redeem by tendering to the mortgagee, or depositing in Court, the principal sum lent with the stipulated interest thereon, (not exceeding the rate of twelve per cent. per annum, if the contract was entered into before Act XXVIII of 1855 came into force) or, if interest be payable, and no rate has been stipulated for, with interest at the rate of twelve per cent. : or by tendering or depositing any less sum which is the total amount due for principal and interest. But if such smaller sum only is deposited, the mortgage will not be considered as redeemed, until it is admitted or established that the deposit covers the full amount due to the mortgagee (e). By Reg. I. of 1798 the mortgagor has the means of avoiding any dispute as to tender, and of keeping alive the right of redemption, by a payment into Court (f).

The deposit must be made in the Civil Court of the district in which the land is situated : and the judge receiving the same, will furnish the party who pays it in, with a written receipt for the amount, specifying the date on which, and the purpose for which, the deposit is made. The judge will, at the same time, cause a written notice of the deposit having been made, to be served on the mortgagee, and will pay to him the amount deposited, on his surrendering the bill of sale or mortgage deed, or showing sufficient cause why it cannot be surrendered (g).

The judge's notice generally calls on the mortgagee to take the money out of court, and to deliver up the mortgage deed and such other title deeds as he may have in his possession, within a certain time,—the period named being any reasonable period, according to the distance of

(e) Reg. I. 1798, Sec. 2: Reg. I. A. 248.
XXXIV. 1803, Sec. 12: Act (g) Reg. I. 1798, Sec. 2: Reg.
XXVIII of 1855, Sec. 5. XXXIV. 1803, Sec. 12.

(f) *Thumbusawmy's case* 2 L. R.

the mortgagee's residence from the station from which the notice is issued (*h*).

In all cases of mortgage by conditional sale, the mortgagor may redeem at any time either before or after the day of payment named in the contract, until the end of one year from the issue and service of notice of foreclosure by the mortgagee. The right of the mortgagor to redeem prior to the day fixed for payment, rests on express enactment (*i*).

In mortgages, however, entered into previous to the promulgation of Regulation XVII of 1806, there can be no redemption after the date on which it was originally stipulated that the sale should become absolute if the debt was not paid (*j*).

A suit was brought in Zillah Sarun in 1863 for the redemption of property mortgaged by way of conditional sale in 1801. The date on which the mortgage debt was to be paid off was the 28th September 1806. It was held (*k*) that Reg. XVII of 1806 took effect, not from the date on which it was passed by the Governor-General in Council (11th September 1806), but from the date of its promulgation,—and that the *onus* of showing that the Regulation was promulgated in Sarun prior to the 28th of September 1806, lay on the plaintiff who sued to redeem : and the suit was dismissed because he failed to give such evidence.

The steps to be taken in redeeming a mortgage by conditional sale when the mortgagee has had possession, are the same as in cases in which he has not had possession. But when the mortgagee is in possession, the mortgagor need never deposit more than the principal sum borrowed

(*h*) Cons. No. 974, 7th August 1836.

(*i*) See *Forbes v. Ameeroonissa*, 10 Moore 340, 5 W. R. P. C. 47. Reg. I. 1798, Sec. 2.

(*j*) *Forbes v. Ameeroonissa*, ubi

supra : *Thumbasawmy's case* 2 L. R. I. A. 248 : *Pattabhiramier's case* 12 Moore 560 (572), 7 B. L. R. 136. And see *post* Ch. IX.

(*k*) 5 W. R. p. 88, (F. B.) overruling W. R. 1864, p. 189.



by him, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. And if the mortgagor deposits a sum less than that required by law, that is to say less than the principal, alleging that the sum so deposited is the total amount due to the lender for principal and interest, after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and the usual notice given to the mortgagee: and if on investigation, it appears that the amount so deposited is the total amount due, the right of redemption will have been preserved to the mortgagor, and he will be entitled to recover his lands (l).

The mortgagor is entitled to receive possession summarily on depositing the principal sum borrowed, leaving the interest to be settled on an adjustment of the mortgagee's receipts and disbursements during the period he has been in possession (m). This adjustment must be carried out by a regular suit, one of the results of which may be the mortgagor's recovering his deposit or a part of it, if it exceeded what was really due. If the mortgagor is unwilling to deposit the whole principal sum, alleging that the whole, or part of it, has been paid, he can obtain possession of his lands only by regular suit.

It has been said that in all instances in which the lender on a bye-bil-wufa, kut-kubala, or mortgage by conditional sale has been in possession, he must account to the mortgagor for the proceeds of the estate while in his possession, in the same manner as in cases of a pure usufructuary mortgage (n). But the Privy Council in the case of *Forbes v. Ameeroonissa* (o), decided that this is not so, and shew distinctly in what cases alone an account is necessary. Their

(l) Reg. I. 1798, Secs. 2 and 3: Reg. XVII. 1806, Sec. 7., 3 B. L. R. a. j. 141.

(m) Cons. No. 339, 25th May 1821.

(n) S. D. A. 1855, p. 482. 9 N. W. P. 371. See *supra* pp. 161 *et seq.*

(o) 10 Moore 340, 5 W. R. P. C. 47.

Lordships say,—“The order of remand can be supported only on the principle that in all cases it is imperative upon a mortgagee who has been in possession to produce his accounts. For this position their Lordships can find no grounds in the Regulations. The words of the 3rd section of Reg. I 1798, from which (if at all) an inflexible obligation to produce the accounts must be inferred, are ‘In all instances wherein the lender on a bye-bil-wufa may have been put in possession of the land, and an adjustment of accounts may consequently become necessary between him and the borrower, the lender is to account,’ &c. Two conditions are expressed : the possession of the mortgagee, and the necessity of an account. And a comparison of this with the preceding sections and with Regulation XVII. 1806, shows that that necessity arises, and need only arise, *Firstly*, When the mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of the account : *Secondly*, When he has deposited all that he admits or alleges to be due : and *Thirdly*, When he pleads, and undertakes to prove, that the whole of the principal and interest has been liquidated by the usufruct of the property.”

The latter clause of section 3 of Reg. I. 1798 is as follows :—“But such part of the Regulation as directs that the mortgages therein referred to, are to be considered as cancelled and redeemed whenever the principal sum with the simple interest due upon it, shall have been realized from the usufruct of the mortgaged property, or otherwise liquidated by the mortgagor, being inapplicable to conditional sales where the mortgagee has enjoyed the usufruct, it is hereby declared not to apply thereto.” The object of this declaration apparently was to show that in the case of an usufructuary mortgage by conditional sale, foreclosure may take place, whereas it cannot occur in the case of a pure usufructuary mortgage ; and that it is only when the principal with simple interest has been realised from the usufruct or otherwise, *prior to the expiry of one year from the*



date of the mortgagee's issuing and serving notice of foreclosure, that such a mortgage will be considered virtually and in effect cancelled and redeemed. It was, in fact, intended to limit the application of the word "whenever." And its application is necessarily so limited: for in all cases, if foreclosure has once finally taken place, the mortgagor's interest in the land is at an end, and he has no further claim on it.

If it were not that Reg. I of 1798, sec. 2 enables the mortgagor to redeem as early as he pleases, the object of the declaration might be taken to be to recognise the right of the mortgagee to resist being redeemed prior to the day of payment named in the mortgage deed. Under the English law the mortgagee has that right (*p*).

There has, however, been a good deal of discussion and misunderstanding as to this clause (*q*).

One who sues to redeem, whether before or after the time limited in the deed of mortgage, on the ground that the mortgagee has realised his debt from the usufruct of the property, need not make any deposit in Court if he denies that any balance is due.

A mortgagor sued for redemption before the time stipulated, alleging that the debt had been paid off from the usufruct, but making no deposit. The Court said:—"The enactment which most clearly lays down the principles upon which a conditional seller should proceed, if he desires to redeem his estate, is Reg. I of 1798. Section 2 (*r*) commences by declaring that the borrower is 'at liberty to pay the amount due, on or before the date stipulated.' This sentence provides both for the *time* at which he may pay, and also for the *amount* to be paid, that is to say, the 'amount due.' But to avoid doubts, the law goes on to declare how this 'amount due' is to be ascertained. It is at first supposed by the law to be the principal sum,

(*p*) 2 Fisher's Law of Mortgage, p. 831.

3d Ed. p. 729.

(*r*) Reg. XXXIV. 1803, Sec. 12.

(*q*) S. D. A. 1851, p. 632: 1852,

with or without interest according to circumstances. Such a deposit will secure redemption : but it by no means follows that the deposit of even a less sum will not have the same effect, for the law goes on to say :—‘ Provided, however, that if the borrower deposit a less sum, alleging that the sum so deposited is the total *amount due* to the lender for principal and interest after deducting the proceeds of the land in his possession, such deposit shall be received ; and if the amount so deposited be the total amount due, the right of redemption shall be considered to have been preserved.’ Now, if the borrower has not the power of demanding an adjustment of accounts in a regular suit for redemption, the Court do not see how the provisions of this law are to be enforced. The *amount due* can be ascertained, only after deducting the proceeds of the land. There is no limit to the smallness,—it might be one rupee, it might be nothing. Section 3 confirms the foregoing section, and more particularly declares that the account is to be made up ‘ on the principles prescribed with regard to mortgages, as far as the same may be applicable to the nature of the case.’ But there is one rule in regard to mortgages, which is not applicable to conditional sales, and the remaining part of section 3 makes the exception accordingly. Were it not for this special exception, no sale could ever become absolute, the words of the mortgage law being that ‘ mortgages are cancelled and redeemed *whenever* the principal with interest shall have been realised from the usufruct.’ For, although a bye-bil-wufa may not have been redeemed by the usufruct or otherwise during the stipulated period, it may have been redeemed by the proceeds of the land during the years which followed the stipulated period ; and if such proceeds could be taken into account, it is clear that no sale could ever become absolute. The Court see nothing in Reg. XVII of 1806, or in any subsequent Regulation, to affect the above construction of the law. The provisions of Reg. XVII of 1806 are *in addition to*, not in supercession of former laws, and



the object of this enactment was to give the mortgagor additional facility of redemption, by enabling him to recover possession whenever he chose to pay down the principal, with or without interest according to circumstances, leaving the *account* to be adjusted subsequently in a regular suit under the provisions of the law (Reg. I of 1798) already referred to" (s).

There was a mortgage in the English form, but in the nature of a conditional sale. By the deed it was agreed that the principal should be repayable on the 4th of September 1868,—and a power of sale was given to the mortgagee in the event of the mortgagor making default in the regular payment of interest. Default having been made, the mortgagee attempted to foreclose in 1866. But the Court held that the mortgagor had (notwithstanding his default in the payment of interest) the right to redeem until the 4th of September 1868, and further until the expiry of the year of grace based on foreclosure proceedings instituted subsequent to that date by the mortgagee. "The year of grace commencing as it does with the notification which follows on the mortgagee's application for foreclosure, is intended by the legislature to be additional to the period which is stipulated for redemption in the mortgage contract: and therefore it follows that the application itself cannot be made before the expiration of that 'stipulated period.' Now the 'stipulated period' of redemption referred to in this Regulation (XVII of 1806, sec. 7) appears to us to be the whole period prescribed by the mortgage contract for the performance of the conditions upon the fulfilment of which the mortgagor is to be entitled to a reconveyance. We do not think it, in any case, means less than this or depends upon whether the mortgagor duly performs all those conditions or not" (t).

A mortgagor seeking an account from his mortgagee, and to redeem, must aver in his plaint, that the principal

(s) 5 N. W. P. 456. But see 1855, p. 432: 1857, p. 503.
S. D. A. 1847, p. 48: 1849, p. 392: (t) 5 B. L. R. 389.

sum with interest has been tendered or been realised from the usufruct or otherwise (*u*). If he states an agreement to pay and receive interest at less than twelve per cent. and it appears from his own account that the debt cannot have been paid off prior to the institution of the suit if a higher rate were allowed, he must establish the agreement for the reduced interest, or his suit will be dismissed (*v*).

It has been held that if it appears from the mortgagor's own evidence, that he is not in a position to redeem in consequence of a balance being still due to the mortgagee, the suit is to be dismissed at once (*w*): and that when, on investigating the accounts, the receipts from the usufruct, or these receipts together with sums deposited or paid to the mortgagee, are found not to cover the amount due, the suit must be dismissed, however small the deficiency may be (*x*), and that the Court cannot give a conditional decree that, on payment of the balance due, the mortgage is to be held redeemed (*y*).

More recently, however, the practise (in the Calcutta Court at any rate) has been not to dismiss the suit wholly because a balance is found to be still due to the mortgagee, but to ascertain what the exact balance is and to declare that the mortgage shall be redeemed upon payment within a reasonable time fixed by the Court (*z*).

A mortgagor who has got a decree to redeem and to be put in possession, may bring a subsequent suit for mesne profits for the time during which the mortgagee remained in possession *after* the institution of the suit (*a*).

(*u*) See 11 N. W. P. 3: 9 N. W. P. 371. S. D. A. 1855, p. 432.

(*v*) S. D. A. 1852, p. 748. See *Shah Mukhun Lal's* case 12 Moore, 157 (201), 2 B. L. R. P. C. 44.

(*w*) 6 N. W. P. 221.

(*x*) S. D. A. 1849, p. 392: 1852, p. 1120. 4 N. W. P. 37: 5 N. W. P. 104: 10 N. W. P. 543.

(*y*) *Nawab Azimut Ali's* case 13 Moore, 404 (412). 10 N. W. P. 543: 1860, p. 84. 8 W. R. 369. Marsh. 112.

(*z*) 18 W. R. 65: 22 W. R. 269: 24 W. R. 275. See also 9 W. R. 572: 17 W. R. 409: and *ante* pp. 165, 166.

(*a*) 7 W. R. 364.



If the mortgagee in a non-usufructuary mortgage by conditional sale, chooses to enter into possession and to remain in possession wrongfully, he must account fully for the mesne profits (b).

A mortgagee after having done all that Reg. XVII of 1806, sec. 8 requires to be done in order to foreclose the mortgage and make the conditional sale absolute (*i. e.* after service of notice of foreclosure, and expiry of the year of grace &c.) must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession. In that suit the mortgagor may contest, on any sufficient grounds, the validity of the conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is due, or that the deposit (if any) which he has made is sufficient to cover what is due. But the issue, in so far as the right of redemption is concerned, will be whether any thing, at the end of the year of grace, remained due to the mortgagee, and if so whether the necessary deposit had been then made. If that is found against the mortgagor, the right of redemption is gone. But so long as the mortgagee remains quiet after the expiry of the year of grace and does not sue to have his title declared absolute, the mortgagor's right of redemption remains unimpaired—save that he must prove that the mortgage debt was in fact paid off, or the necessary deposit made, before the expiry of the year of grace (*c*). And as a general rule a mortgagor can raise, in a suit instituted by himself after the expiry of the year of grace, any question which he could use by way of defence in a suit brought by the mortgagee for possession. As in a suit instituted by a mortgagee for possession or to declare his title as absolute proprietor on foreclosure, the mortgagor might

(b) 7 W. R. 30.

Moore 340, 5 W. R. P. C. 47. S.

(c) *Forbes v. Ameeroonissa*, 10

D. A. 1848, p. 711 : 1859, p. 127.

plead satisfaction of the mortgage debt prior to the expiry of the year of grace, so the mortgagor is entitled to raise the same question in a suit brought by himself for redemption (*d*).

On the expiry of the year of grace, the rights of the mortgagor are at an end, unless he can prove that the mortgage debt was in fact liquidated before the year expired. And one suing to redeem must under the old law do so within twelve years from the date on which the year of grace came to an end :—now however there apparently is no limitation save that of sixty years from the date of the mortgage (*e*).

In a case in the Bombay Court, it appeared that a Mahomedan had given a bye-bil-wufa to a Parsi, who was put in possession. In a suit to redeem, it was held that (under the Bombay Regulation IV of 1827, sec. 26) the law to be applied was that of the defendant in possession, *viz.* justice, equity and good conscience : and that as part of the mortgaged premises had been burnt through no blame of the mortgagee and had been rebuilt by him, there could be no redemption save on paying to the mortgagee the amount so expended by him properly (*f*).

(*d*) S. D. A. 1857, p. 503.

1859, p. 1494 : 1861, v. 1, p. 8.

(*e*) Act XIV of 1859, sec. 1.

8 W. R. 476.

cl. 12. Act IX of 1871, sch. 2.

(*f*) 5 Bom. a. j. 109.

art. 148. S. D. A. 1854, p. 137:



CHAPTER IX.

OF THE REMEDIES OF THE MORTGAGEE, INCLUDING FORECLOSURE.

THE mortgage debt being the principal, and the land pledged being merely a security, the mortgagor, notwithstanding his breach of condition, still continues relievable from the strict letter of his contract, on payment of principal, interest, and costs. But this, except in the case of pure usufructuary mortgages, is only in the event of the mortgagee not coming forward and seeking the assistance of the law to enable him to enforce his security, which assistance will be granted to him, in order that he may not remain subject to a perpetual account, or be deprived forever of the money advanced by him. On this principle rests the doctrine of foreclosure, in the application of which, the forbearance of the law towards the mortgagor is carried very far. The mortgagee however, when once he has obtained his decree declaring his title as absolute proprietor on foreclosure, is freed from all further uncertainty, as the foreclosure can never be opened or disturbed on other grounds than those on which the Courts will in ordinary cases set aside their own decrees. In England, the Courts are always anxious to afford every reasonable relief to the mortgagor, and even after a decree of foreclosure has been made, and the mortgagee has obtained possession they will, under special circumstances, open the decree (a).

(a) See 2 Fisher's Law of Mortgage, pp. 1054—1059.



The limitation of suits instituted on or after the 1st of April 1873 is regulated by Act IX of 1871.

In suits for money charged upon immoveable property the period is twelve years and it begins to run when the money sued for becomes due (*b*). The allowance and fees called *malikana* and *hugg* are deemed to be money charged on immoveable property (*c*).

It has been held that a bond whereby the superstructure of a house, exclusive of the land beneath, is hypothecated, creates an interest in immoveable property,—the apparent intention being to mortgage the house and not merely the materials of which it was composed (*d*).

In a suit instituted in a Court not established by Royal Charter (*i. e.*, not one of the High Courts) by a mortgagee for possession of immoveable property mortgaged, the period of limitation is twelve years, running from the time when the mortgagee is first entitled to possession (*e*).

In a suit in a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, the period of limitation is sixty years, and it begins to run from the time when any part of the principal or interest was last paid on account of the mortgage debt (*f*).

No promise or acknowledgment in respect of a debt will take the case out of the operation of the Act unless the promise or acknowledgment is contained in some writing signed, before the expiration of the prescribed period, by the party charged therewith or by his agent generally or specially authorised in this behalf. But when such writing exists, a new period of limitation according to the original liability is to be computed from the time when the promise or acknowledgment was signed. When the writing containing the promise or acknowledgment is undated, oral

(*b*) Act IX of 1871, sch. 2, art. 132.

(*c*) *Ib.* Explanation.

(*d*) 8 Mad. 100. See 3 B. L. R. o. j. 90.

(*e*) Act IX of 1871, sch. 2, art. 135. See 24 W. R. 433.

(*f*) *Ib.* art. 149. The corresponding period under Act XIV of 1860 was only twelve years.



evidence may be given of the time when it was signed. But when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received (*g*).

An acknowledgment may be sufficient, though it omits to specify the amount of the debt, or avers that the time for payment has not yet come, or is accompanied by a refusal to pay or deliver, or is coupled with a claim to a set-off, or is addressed to any other person than the mortgagee or creditor. But it must amount to an express undertaking to pay the debt, or to an unqualified admission of the liability as still subsisting (*h*).

One of several partners is not rendered liable by reason only of a promise or acknowledgment signed by another partner (*i*).

The acknowledgment must be *signed* by the person making it: and his *seal* is not sufficient, even though affixed by the debtor to a letter written by himself (*j*).

When interest on a debt is, before the expiry of the prescribed period, paid as such by the person liable to pay the debt, or by his agent generally or specially authorised,—or when part of a principal debt is before the expiration of the prescribed period paid by the debtor or his agent,—a new period of limitation is computed from the time the payment was made. But in the case of part payment of principal, the debt must have arisen from a contract in writing, and the fact of the payment must appear in the handwriting of the person making the same, on the instrument, or in his own books, or in the books of the creditor (*k*).

As regards suits instituted on or after the 1st of January 1862 and before April 1873, the law of limitation is to be found in Act XIV of 1859: and under it, it may be said generally that a suit for possession by a mortgagee, or for the recovery of immoveable property, or of any interest

(*g*) Act IX of 1871, sec. 20.

(*h*) *Id.* Explanation 1.

(*i*) *Id.* Explanation 2.

(*j*) *Id.* Illustration.

(*k*) *Id.* sec. 21.



in immoveable property must be brought within the period of twelve years from the time the cause of action arose (*l*).

Lands in the mofussil were in 1845 mortgaged by a deed in the English form. The mortgagor was to remain in possession until default: but the mortgagee had a right to enter on default. The mortgagor made default: but the mortgagee took no steps to get possession. Thereafter, in 1849, the mortgagor sold part of the property, and the purchaser got possession and registered his title in the Collectorate in January 1850. An assignee of the mortgagee subsequently brought a suit for foreclosure in the Supreme Court at Calcutta,—to which the purchaser was no party—and in 1862 obtained a decree for foreclosure. The assignee of the mortgagee then brought a suit in the mofussil against the purchaser to recover possession of the portion of the mortgaged property purchased by him. The purchaser having pleaded limitation, under Act XIV of 1859, sec. 1, cl. 12, it was held that neither he nor the property in his possession were affected by the foreclosure proceedings, and that as the mortgagor and the purchaser from him had, after default, held possession for more than twelve years, the suit was barred. In delivering judgment the Privy Council said,—“it is impossible to hold that the defendant (the purchaser) was holding or supposed that he was holding by permission of the mortgagee: and when both things concur,—possession by such a holder for more than twelve years, and the right of entry under the mortgage deed more than twelve years old,—it is impossible to say that such a possession is not protected by the law of limitation” (*m*).

So, where the default occurred on the 9th of July 1855 and on the 18th of December 1856 the mortgagor's rights in the property were sold in execution of a decree, and

(*l*) Act XIV of 1859, sec. 1, cl. 144 (150),—affirming the decision
(*2*). See 2 Agra, 244: 9 Bom. 53. in 6 W. R. 269. See 5 B. L. R.

(*m*) *Brayonath Koondoo Chowdry*
v. *Khelut Chunder Ghose*, 14 Moore 389.



were bought, without notice of the mortgage, by a purchaser who got possession. In August 1867 the assignee of the mortgagee instituted foreclosure proceedings under Reg. XVII of 1806, against the purchaser. Having completed the foreclosure proceedings, the assignee on the 22nd of January 1872 instituted a suit against the purchaser to recover possession. But it was held that the cause of action of the mortgagee and of his assignee, arose on the default made in July 1855, and that the suit not having been commenced within twelve years from that date was barred under Act XIV of 1859, sec. 1, cl. 12 : and that no new cause of action arose, by reason of the foreclosure proceedings, on the expiry of the year of grace in August 1868 (n).

In another case, the mortgagee might (under his mortgage deed) have taken possession on the mortgagor's making default in 1255 : he did not, however, avail himself of his rights, but in 1267 sued for and obtained a decree for foreclosure. Subsequently he sued to recover possession against purchasers of the mortgagor's rights who had been in possession since 1253, but who had not been made parties to the foreclosure suit. The Court held that the mortgagee's cause of action arose on the first default made by the mortgagor in 1255, and that the decree in the foreclosure suit gave no fresh starting point (o).

These were cases of suits brought against purchasers from the mortgagor who had got into possession and had held for more than twelve years adversely to the mortgagee.

By an instrument of mortgage of 1847 it was provided that if the debt were not paid within five years, the property mortgaged should be considered as absolutely sold to the mortgagee. Default was made, and the mortgagee entered into possession and continued in possession until 1858 when he was turned out by the mortgagor. In 1866 the mort-

(n) 14 B. L. R. 87, 22 W. R. 90.

(o) 6 W. R. p. 184.

gaggee filed a suit in the nature of a foreclosure suit against the mortgagor. It was held that his cause of action arose in 1858 when he was dispossessed, and that he had twelve years from that date within which to bring his suit (*p*).

But as between the mortgagor and mortgagee, a default may be made by the mortgagor which may give the mortgagee a right to sue or to enter into possession, if he chooses to assert such a right, but which may notwithstanding have no effect whatever in altering the nature of the mortgage title. If notwithstanding one or more defaults, there be no repudiation of the mortgagee's right, but on the contrary a recognition of it, there is nothing in the law to limit the time within which the mortgagee may foreclose. "So long as the mortgagor in possession, or those who claim under him, assert merely a title to redeem, and advance no other title inconsistent with it, such possession must, *primâ facie* at least, be treated as perfectly reconcileable with, and not adverse to, the title of the mortgagee and the continuation of the lien on the property pledged" (*q*).

When there is a bond to secure the payment of a sum of money with interest, by which bond also lands are charged (by way of simple mortgage) with the payment of the debt,—a suit to have it declared that the lands are charged with the payment of the debt and for an order for the sale of the lands, as subject to the charge, in satisfaction of the debt, is a suit founded not on the mere contract to pay the debt but upon the hypothecation of the land, and the period of limitation is twelve years running from the origin of the cause of action (*r*).

(*p*) 9 Bom. 53. See S. D. A. 1848, p. 722.

(*q*) 1 Agra, F. B., p. 102. See 14 B. L. R. 315.

(*r*) *Juneswar Dass v. Mahabeer Sing*, 3 L. R. I. A. 1. Act XIV of 1859, sec. 1, cl. 12. See 9 W. R. 170 (F. B.): 8 W. R. 335: 2 Mad. 51, 307.

As to the difference (as regards limitation) between registered and unregistered instruments and contracts for the payment of money,—see Act XIV of 1859, sec. 1, cls. 9, 10, 11, 16: and Act IX of 1871, sch. 2, arts. 56, 65, 66, 67, 115, 116, 117.



Under Act XIV of 1859, if the person who, but for the law of limitation, would be liable to pay a debt, admitted that such debt or any part of it was due, by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, ran from the date of such admission; but if more than one person were liable, none of them became chargeable by reason only of a written acknowledgment signed by another of them (*s*). An account stated, acknowledged to be correct and signed by an agent, is not an acknowledgment in writing signed by his principal so as to extend the period of limitation (*t*). And a memorandum of payments made, endorsed on the bond and signed by the principal is not sufficient (*u*),—nor is a balance struck and orally acknowledged to be correct (*v*). But it is not necessary that in the acknowledgment a precise sum should be mentioned, or that there should be a promise to pay. All that is required is that there should be a distinct acknowledgment of the claim (*w*).

In suits in Courts established by Royal Charter, by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action is, under Act XIV of 1859, to be deemed to have arisen from the latest date on which any portion of the principal or interest was paid on account of the mortgage debt (*x*).

Under the Acts both of 1859 and of 1871, if any person entitled to a right of action has by means of fraud been kept from the knowledge of his having such right, or of the title upon which it is founded, or if any document necessary for establishing such right has been fraudulently concealed, the time limited for commencing the action against the person guilty of the fraud or accessory thereto,

(*s*) Act XIV of 1859, sec. 4.

(*t*) 8 W. R. 1. 6 Bom. Q. J. 67.

(*u*) 8 W. R. 335.

(*v*) 1 Agra F. B. 94. 3 Mad.

(*w*) *Gopeekishan Gossami's case* 13 Moore, 37, 3 B. L. R. P. C. 37. See 4 Mad. 384, 359. See *ante* pp. 152, 153.

(*x*) Act XIV of 1859, Sec. 6.

or against any person claiming through him otherwise than in good faith and for a valuable consideration, must be reckoned from the time when the fraud first became known to the person injuriously affected by it, or when he first had the means of producing or compelling the production of the concealed document (*y*). And in suits in which the cause of action is founded on fraud, the cause of action is to be deemed to have first arisen at the time when such fraud became first known by the party wronged (*z*).

The Acts themselves must be referred to for further details regarding limitation in the case of minors, and the like.

If any person without his consent has been dispossessed of immoveable property otherwise than by due course of law, he or any person claiming through him is, in a suit brought to recover possession of such property, entitled to recover possession thereof notwithstanding any other title that may be set up in such suit, provided, that the suit be commenced within six months from the time of such dispossession. But this does not bar the person from whom such possession has been so recovered, or any other person, from instituting a suit to establish his title to the property and to recover possession of it within the ordinary period of limitation (*a*).

Under the old law of limitation (*b*), governing suits instituted before Act XIV of 1859 came into force, the period of limitation ran from the date when the cause of action first arose. If the object of the suit was to set aside a mortgage deed, the cause of action arose on the day the deed was executed, except in cases of fraud, when the plaintiff might have the benefit of the latter part of sec. 14, Reg. III of 1793 (*c*). If the suit were for possession, the twelve years ran from the earliest date on which the plaintiff was entitled to possess-

(*y*) Act IX of 1871, sec. 19: which is still in force.
 Act XIV of 1859, sec. 9.

(*z*) Act IX of 1871, sch. 2, art. 95: Act XIV of 1859, sec. 10. (*b*) Reg. III of 1793, sec. 14: Reg. II. 1803, sec. 18.

(*c*) 2 W. R. p. 273 note.

(*a*) Act XIV of 1859, sec. 15,—



ion,—if for money, from the day on which he might first have sued for it. Thus if the terms of the agreement were such that the mortgagee was entitled at once to possession as usufructuary, a suit for possession must be instituted within twelve years from the date of the deed (*d*). And where the deed stated that possession had already been given to the mortgagee, who was to hold it for three years, at the end of which time the mortgagor might redeem on payment of the loan with interest, and in default of his doing so, the property was to become the mortgagee's—it was held that the cause of action at once arose on the failure of the mortgagee to obtain the possession agreed upon, and that as he had never been in possession, a suit for possession by him must be brought within twelve years from the date of the deed (*e*).

Certain mortgaged lands were sold by the Collector for arrears of revenue, while a suit for possession by the mortgagee was pending in the civil courts. The surplus proceeds of the sale were, before the suit for possession was decided, appropriated by the Collector in payment of arrears on other estates belonging to the mortgagor. The mortgagee obtained a decree for possession. Within twelve years from the date of that decree, but more than twelve years from the date of the transfer made by the Collector, the mortgagee brought an action against him for the recovery of the surplus proceeds so transferred. The majority of the Court held that his suit was barred by lapse of time, and would not lie. And no doubt, the mortgagor's allowing the property to be sold for arrears, was such a breach of contract on his part, as gave the mortgagee an immediate right of action for the recovery of his debt (*f*).

A *birt putr* was granted, which was a deed of absolute sale, under which, if it had been unaccompanied by any

(*d*) S. D. A. 1857, p. 1816. See N. W. P. v. 5, p. 239 : v. 6, p. 54 : v. 7, p. 322 : v. 8, pp. 100, 391 : v. 10, p. 243 : v. 11, p. 72 : 1860, p. 280 : 7 Sel. Rep. 77.

(*e*) 8 N. W. P. 550. See 10 N. W. P. 243.

(*f*) S. D. A. 1854, p. 182. See *supra*, pp. 113, 130.



other document, it would have been necessary to sue for possession within twelve years from the date of execution. But the sale was rendered conditional by means of an *ikrar-namah* executed eight days afterwards, which gave the seller a right to redeem at the end of five years, on repaying the sum advanced to him with interest. The Court decided that the *birt putr* was virtually put in abeyance by the subsequent deed, and that the right of the purchaser under it did not revive until the default of the seller at the end of the five years: that consequently no cause of action arose until the expiration of the five years, and that as a suit for possession within that period could not have been entertained, a suit within twelve years from its expiry was in time. It was further the opinion of the Court, that had the *birt putr* or the *ikrar-namah* contained any stipulation that the purchaser and lender should enter into possession, the date on which he might first have entered would have been the time when his cause of action first arose, within twelve years from which his suit must have been brought (*g*).

But in calculating the date from which limitation begins to run, care must be taken not to confound the time at which the mortgage debt becomes recoverable, with the time at which some collateral debt, included in the deed, becomes due. Thus, where the mortgagor was to remain in possession at a monthly rent, and in default of payment the mortgagee was to take possession, the mortgagor having failed in his first and all other payments, it was held that the limitation as to the mortgage debt, did not commence on these defaults (*h*). And when the mortgage debt is re-payable by instalments, on default of payment of any one of which the whole becomes due and the mortgagee may foreclose, the mortgagee is not bound to foreclose on the first default but may proceed to foreclose upon a subsequent default,—the previous one notwithstanding (*i*).

(*g*) N. W. P. v. 8, p. 391; v. 9, p. 130. See v. 10, p. 243.

(*h*) 5 N. W. P. 239.

(*i*) 1 Agra, F. B. 102. 14 B. L. R. 315. See Act IX of 1871, sec. 23.

If a debtor makes payments in respect of instalments which are barred by lapse of time, he cannot afterwards say he need not have paid them, and set them off against later instalments which are not barred (*j*).

A mortgagee who had issued notice of foreclosure, was held under the old law of limitation to have a further period of twelve years from the expiry of the year of grace, during which he might sue to have his title declared absolute and to be put in possession: but if he let the twelve years pass without bringing his suit for possession on foreclosure, his right was wholly lost to him (*k*). And when a mortgage is duly foreclosed, the twelve years within which the mortgagee must sue for possession run from the date of final foreclosure, whether the mortgage was foreclosed on the earliest possible day or not (*l*).

Their Lordships of the Privy Council have remarked that "it cannot be laid down as a rule universally true, that under Reg. III of 1793, sec. 14, a mortgagee's proceeding for a foreclosure under a mortgage of the class of bye-bil-wufa simply, cannot be preferred after twelve years from the expiration of the time which the instrument fixes as the period of redemption by payment, and on the expiration of which the conditional sale will become absolute: for this indiscriminating ground of decision would include alike adverse occupations and those which had not the semblance even of such a character, and would establish a bar arising from simple occupation and not from the laches of the defendant or of others before him" (*m*). And again they say: "As no difference between the law prevalent in India and the law prevalent here, as to the relation between mortgagor and mortgagee on this point, has been suggested, the possession of those who claim under the mort-

(*j*) N. W. P. v. 8, p. 361: v. 9 p. 477.

(*k*) 7 Sel. Rep. 45. S. D. A. 1857, p. 1816: 1859, p. 1494. See 1856, p. 817,

(*l*) 1 Agra, F. B. p. 102. See 14 B. L. R. 87. See *ante* p. 179.

(*m*) *Prannath Roy Chowdry v. Rookea Begum*, 7 Moore 323, 4 W. R. P. C. 37.

gagor, so long as they assert a title to redeem, and advance no other title inconsistent with it, must *prima facie* at least, be treated as perfectly reconcilable with, and not adverse to the title of the mortgagee and the continuation of his lien on the thing pledged. It is by no means the essence of such a title there, any more than it is here, that it should be accompanied by an actual continuing possession of the lands. The pledgee may from various causes be reluctant to assume possession of the pledge, or to shorten the period of its redeemable quality."

In certain cases, undisturbed possession for twelve years gave a good title under the old law, without reference to the time when the plaintiff's cause of action arose. In the case of *Enayat Hossein v. Sayud Ahmed Beg (n)*, the Privy Council said that the object of Regs. III of 1793, sec. 14, and II of 1805, sec. 3, cls. 1, 2, and 3, "appears to be to protect the title of parties who have been in possession under a *bond fide* title, or what is supposed to be a *bond fide* title, for the period of twelve years. But certain exceptions are introduced into those Regulations,—amongst others that the limitation of twelve years is not to apply where the party has been precluded by good and sufficient cause from bringing his suit within the period. Neither is it to apply, if the original possession obtained by the party in possession has been obtained unjustly: and the Regulations are not to apply to cases where the property had so come into the hands of other persons from whom the parties in possession may have derived their title, and shall not have been subsequently held under a just and honest title."

But it is only a really *bond fide* possession of twelve years that will give a title under the old law; and when the title has been throughout disputed and litigated, the possession even though undisturbed, is not a *bond fide* quiet possession which will give any title. A's title accrued in 1813, but

(n) 7 Moore 238. See *Sheik Indad Ali v. Must. Koosbee Begum*, 3 Moore 1, 6 W. R. P. C. 24; *Gunga*

Gobind Mundul v. Collector of Pergunnahs, 11 Moore 346, 7 W. R. P. C. 21. See W. R. 1864, p. 159.



a suit which he brought in order to establish it, was not finally decided by the Privy Council till 1842. It was held that as it was impracticable for A to sue for possession until the question raised in his first suit was decided by the Privy Council, a suit for possession brought within twelve years from the date of the decree in 1842, was not barred: and that the possession of the other party under a *foujdary* order of a Magistrate, although extending over much more than twelve years, was no *bond fide* possession such as barred A's right (o).

Certain property being under mortgage, the right, title and interest of the mortgagor were attached and sold in execution of a decree, and the purchaser was put in possession of the property. The mortgagee subsequently got a decree for foreclosure in the Supreme Court, but did not make the purchaser a party. Within twelve years from the date of the decree of foreclosure, but more than twelve years after the purchaser got possession, the mortgagee brought a suit for possession, making the purchaser a defendant. The suit was held to be barred (p).

The right and title of A in an estate were sold in execution of a decree. B was declared the purchaser and was put in possession, having no notice of the existence of a mortgage in favor of C. After B had been in possession for more than twelve years, C brought a suit (under the old law) against him to recover possession. The Privy Council held that, under the circumstances, the possession of B was in no way as mortgagor or under the mortgagor, but as owner, and was adverse to the title of the mortgagee: and that it was necessary that a suit by the mortgagee to disturb the possession of such a purchaser should have been brought within twelve years. In this case no proceedings with a view to foreclose the mortgage had, within the twelve years, been taken against the purchaser (q).

(o) *Rajah Enayut Hossein's case*, see pp. 21, 546.

7 Moore 238. See 1 Hay, 306: 8 W. R. 372.

(p) S. D. A. 1853, p. 210, also

(q) *Anundomoyee Dossee v. Dhondro Chunder Mookerjee*, 14 Moore, 101, 8 B. L. R. 122.



A fraudulently obtained possession, and B afterwards purchased the property at an execution sale under a decree against A. More than twelve years after the dispossession by A, but less than twelve years after the purchase by B, a suit for possession was brought against the latter by C. It was held that C's right of action was not barred, B not having possessed under a *bond fide* title for twelve years (r).

Possession obtained by a mortgagee under his mortgage, is not a *bond fide* possession, or such as can convey a permanent title (s). "Under the Regulation, an adverse title must also be a *bond fide* title under the shorter period of limitation: and as neither mortgagor nor mortgagee can in ordinary cases be unconscious of the conditional nature of their own titles, there is no ground for presuming generally, between the immediate parties, adverse title from mere length of possession" (t).

Under Act IX of 1871, section 29, on the termination of the period limited to any person for instituting a suit for possession of land, his right to such land is extinguished. The effect of this is that, after the prescribed period of limitation has passed, an absolute interest in the land exists in the party who has been in possession during that period.

The law of limitation must always be strictly applied. But if the period of limitation prescribed for a suit expires on a day when the Court is closed, the suit may be instituted on the day the Court re-opens (u).

A suit brought by a mortgagee to recover from the mortgagor personally the amount due to him, must be brought in a Court within the limits of whose jurisdiction the cause of action arose, or the defendant at the time of the commencement of the suit resides or works for gain &c. (v). If

(r) 9 N. W. P. 391.

37. S. D. A. 1860. v. 1, p. 443.

(s) 9 N. W. P. 425. See S. D. See 2 Mad. 382, and *ante*, p. 191.
A. 1857, p. 121.

(u) Act IX of 1871 sec. 5, a.

(t) *Prannath Roy Chowdry's* (v) Act VIII of 1859, sec. 5.
case, 7 Moore 323, 4 W. R. P. C. Act X of 1877, sec. 17.



the suit be for possession of the property mortgaged, the rules as to the Court in which it is to be instituted are the same as those which apply in the case of redemption suits (*w*).

A suit on a simple mortgage, to ascertain the amount of the debt and have it declared a charge on the land, and for a decree for sale, is so far as it affects the land, a suit for land within the meaning of section 5 of Act VIII of 1859. Thus the mortgaged land being in the district of Z, but the mortgagor not being personally liable to the jurisdiction of the Court of that district, it was held that a suit to have the land declared liable to the charge, and for sale, was well brought in the district Court of Z. But that Court could not give a decree against the mortgagor *personally* for the mortgage debt (*x*).

The Calcutta High Court, in the exercise of its ordinary original civil jurisdiction, can entertain a suit for land situated either wholly or in part within the local limits of the original jurisdiction. But if only part of the land is within the local limits, the leave of the Court must be obtained at the time the plaint is presented (*y*). And where there is a mortgage of lands some of which lie in the town of Calcutta and some in the mofussil, a suit for an account and foreclosure of the whole will lie in Calcutta, leave to file the plaint having been obtained from the Court at the time it was presented (*z*).

A suit for possession, by the holder of a zur-i-peshgee lease, or a suit to cancel such a lease, must be an ordinary regular suit and not one under the special rent-law (*a*).

It has been held that when land is mortgaged to two persons jointly, to secure a sum advanced by them in

(*w*) *Supra*, p. 160. Act VIII of 1859, secs. 5—14. Act X of 1877 sec. 16 &c.

(*x*) 9 B. L. R. 171, 18 W. R. 269. So 18 W. R. 287; 23 W. R. 123, and 2 All. (1870) p. 19. See *contra*, 9 Bom. 12. See *post*, p. 202.

(*y*) Sec. 12 of the High Court's Letters Patent of 1865. See 6 B. L. R. 686.

(*z*) 11 B. L. R. 301.

(*a*) 8 W. R. 302, 310. See 1 W. R. 52.

equal proportions, a suit by one for his share of the money will lie, although he does not make his co-mortgagee a party to the suit (*b*). And where one of two joint mortgagees (by way of simple mortgage) sued for his moiety of the debt, and got a decree for it, and in execution attached and sold the mortgaged property,—it was held that the other mortgagee might sue for *his* moiety and have the lands sold a second time in execution of *his* decree, unless the purchaser at the first sale chose to redeem. In this last case, the purchaser took with notice of the claim of the other mortgagee (*c*). This decision, however, cannot safely be followed. There is no doubt that as a general rule, if the mortgagees are joint, and there is in the mortgage contract no express severance of their interests, the suit for the recovery of the money due upon the mortgage must comprise the interests of all the mortgagees, and they must be parties to the suit either as plaintiffs or as defendants.

Where there was a large body of co-sharers in an estate which had fallen into arrears and was about to be sold by Government, and certain persons saved it from sale, by advancing the sum required, in return for which they got a conditional sale of the property executed by thirty-nine sharers, it was held that as this sale had been for many years recognised by the whole body of sharers, the mortgagees were entitled to foreclose the mortgage against the whole body, although it appeared that four or five sharers were not in any way parties to the execution of the original deed of mortgage (*d*).

It is only in mortgages by *bye-bil-wufa*, *kut-kubala*, or conditional sale, that foreclosure can occur.

In pure usufructuary mortgages, including those by lease, nothing more than a temporary enjoyment of the land is given to the mortgagee, liable to be put an end to at any moment (unless the mortgagor is barred under the Limitation Acts of 1859 or 1871), on the mortgage debt being

(*b*) 8 N. W. P. 91.

(*d*) 9 N. W. P. 133.

(*c*) 3 W. R. 130.



cleared off (e). In simple mortgages, and in mortgages by bye-bil-wufa, kut-kubala or conditional sale, whether accompanied by possession and usufruct or not, the mortgagor may, if he make default, be deprived of his whole interest in the property he has pledged. In the former case, the rights of the mortgagor are, under a decree of Court, put up for sale, and transferred to whomsoever may be declared the purchaser: in the latter, foreclosure takes place, that is to say, all the interest of the mortgagor in the mortgaged lands ceases, and passes directly from him to the mortgagee.

The mortgagee is bound by the terms of his contract, and cannot sue to foreclose, or to have his debt paid or the land sold in satisfaction of it, until the time fixed by the contract for the repayment of the loan has passed (f).

There was a zur-i-peshgee lease for ten years at a certain fixed *jumma*, with an express contract by the mortgagor to repay the principal on a day named: and the lease provided that the mortgagee should out of the fixed *jumma* retain a certain sum annually by way of interest and Government revenue, and should pay to the mortgagor the residue of the *jumma*. It was also agreed that if the income of the property improved through the agency of the mortgagee, the mortgagor should have no claim to it: that the security should remain in force till the date of payment: and that meanwhile the mortgagor would not sell or mortgage the property. It was held that, after the period fixed for payment had passed, the mortgagee had a right to sue the mortgagor personally for the amount due and to have the property sold in satisfaction,—and further, that, as the mortgage was entered into subsequent to the repeal of the usury laws, the mortgagee was not bound to account for receipts from the property in excess of the annual *jumma* named in the lease (g).

(e) See S. D. A. 1859, p. 382.

(g) 6 W. R. 283.

(f) See S. D. A. 1854, p. 507.



I. In a case of simple mortgage, the mortgagee may bring his suit at any time (except where the ordinary limitation rules intervene) after the debt has become due according to the terms of the agreement: and no notice of the intention to sue need be given to the mortgagor, more than is required to be given to the defendant in any ordinary suit. The suit is brought for the recovery of the sum lent, with interest and costs, and for a declaration of the mortgagee's lien on the land. If the property is in the possession of third parties who claim it as purchasers, or otherwise in a manner adverse to the mortgagee, they should be made defendants, so that the claims of all who have, or assert, an interest in the matter, may be disposed of in one suit (*h*).

The Court after ascertaining the amount remaining due, will give a decree for it and make a declaration as to the mortgagee's lien. If the mortgagor does not pay the sum decreed, the mortgagee must apply to the Court to have the mortgaged land sold in execution: and if the Court has declared his lien established, he will be entitled (but only as against parties to the suit) to an order for the sale of the right and interest of the mortgagor in the property, as they stood when the mortgage was entered into. Any surplus which remains after liquidating the debt, belongs to the subsequent incumbrancers if they are parties to the suit, and subject to their claims, if any, to the mortgagor.

The decree is always against the mortgagor personally, and if the suit has been properly framed, should declare the mortgagee's lien on the land (*i*). If the land does not produce a sufficient sum, the mortgagee may still proceed against the mortgagor for the residue unpaid, as an ordinary decree-holder: and in so proceeding he is not restricted to the particular property over which he has a lien. Thus, if his lien extends only to one moiety of an estate and that moiety proves insufficient, he may take out execution against the whole estate, if the other moiety also belongs

(*h*) See *Anundomoyee Dossee v. Dhonendro Chunder Mookerjee*, 14 R. 306. (i) S. D. A. 1858, p. 358. 22 W. Moore 101, 8 B. L. R. 122.



to the debtor. As regards the latter moiety, however, his position will be only that of an ordinary decree-holder (*j*).

A mortgagee suing for a debt secured by simple mortgage, and to have the pledged property sold in satisfaction of it, need not include in his suit a prayer to set aside alienations of a date subsequent to that of his own mortgage; for the liabilities of the land are not, so far as the mortgagee is concerned, affected by such transfers (*k*).

A obtained a decree on a simple mortgage bond. B also obtained a decree on a similar bond, and sold the lands in execution. But B's mortgage was subsequent to A's. It was held that A's rights were not prejudiced by the sale, and that he was entitled to have the property re-sold in execution of his decree, free from all subsequent incumbrances. And the fact that A had not taken out process of attachment against the lands, or given any intimation of his mortgage, at the time of B's sale, was held not to injure A's right (*l*).

Where the mortgaged property has been sold by the mortgagor subsequent to the mortgage, and the purchaser is a party to the mortgagee's suit, the decree should reserve to the purchaser the right to save the property from sale on his paying off the sum due to the mortgagee (*m*).

If the mortgagee's suit is merely for the recovery of the money due to him, the fact of the decree being silent as to the particular property against which he may execute his decree, does not invalidate his lien. But if the mortgagee has only a decree for the payment of a sum of money, he cannot execute it against the mortgaged property, to the prejudice of a *bona fide* purchaser. He may, however, enforce his lien on the mortgaged property by separate suit against the subsequent purchaser in possession (*n*).

(*j*) S. D. A. 1859, p. 1009. 19 W. R. 281.

(*k*) *Supra*, pp. 124, 128. S. D. A. 1867, pp. 953, 1063. 1 Hay, p. 106. W. R. v. 19, p. 290; v. 21, p. 271; v. 2, p. 21 (Misc.). See 1 B. L. R. 152.

(*l*) N. W. P. v. 10, p. 680.

(*m*) S. D. A. 1858, p. 358. See 23 W. R. 338, and *post*, pp. 201-5.

(*n*) 1 W. R. 315 (F. B.); 2 W. R. pp. 130, 282; 5 W. R. p. 115; 6 W. R. p. 312; 9 W. R. pp. 82, 150, 170 (F. B.). 3 B. L. R. *ap.* 140.



There being two simple mortgages of the same estate, the first mortgagee got a mere money-decree, not alluding in any way to the estate pledged. In execution of that decree, the property was attached and sold : and the purchaser was put in possession. Subsequently the second mortgagee sued in like manner and got a decree merely for the amount due to him. Then he sued the purchaser under the first decree, praying for a declaration that his (the second mortgagee's) lien was good, and that he was entitled to sell the estate as it stood on the date of the mortgage to him. It was held that the purchaser was entitled to plead and to prove the first mortgage (*o*). Having proved it, the purchaser would have priority, but would be liable to be redeemed by the second mortgagee.

A person, on borrowing a sum of money, gave his bond for it : and the bond also pledged certain property, providing that any sale or mortgage of it, until the lender's claim was satisfied in full, should be invalid. The lender afterwards brought a suit for the money in the Supreme Court and obtained a decree. He attempted to execute his decree, as an ordinary judgment creditor, by sale of the property pledged, but was resisted by some intermediate incumbrancers whom he found in possession. He then instituted a suit in a *mofussil* Court to realise the sum which had been decreed to him, by setting aside the intermediate incumbrances, as illegal and contrary to the terms of his mortgage. It was held that, inasmuch as there was an express pledge of the lands to him, and a proviso that any sale or mortgage of them prior to the payment of his debt should be invalid, the mortgagee's having already obtained a decree for money, without any allusion being made to the sale of this particular property in execution, did not injure his lien, and that he was still entitled to bring the mortgaged lands to sale free from subsequent incumbrances (*p*). But the lands could be so sold, only if the subsequent incumbrancers

(*o*) 7 W. R. p. 232. See *post*, 1 Hay, p. 266, W. R. Sp. p. 40. pp. 201-205.

(*p*) N. W. P. v. 8, p. 316. See



were parties to the suit and did not exercise their right to redeem.

In a case in which the mortgagee had got merely a decree for the payment of money, ignoring the existence of a mortgage, a subsequent decree-holder came in and sold the right and interest of the mortgagor in the property mortgaged. It was held that the mortgagee might still follow the land until his debt was satisfied, but that he could not claim the money realised at the sale in execution of the subsequent decree which had been obtained (*q*). If, however, in such a case as this, the mortgagee wished to follow the land, he would have to get a decree establishing his lien as against the purchaser, if the latter were in possession (*r*).

When a mortgagee (by simple mortgage) gets a mere money decree and under it attaches and sells the mortgaged property, the whole interest both of the mortgagor and of the mortgagee passes to the purchaser,—in other words, if a mortgagee who has got only a money decree attaches and sells the right, title and interest of the mortgagor in the property, the purchaser takes the whole interest of both the mortgagor and the mortgagee, and the latter cannot afterwards sue for a declaration that his debt is a charge on the land, and for sale, &c., under his mortgage.

In the first of the cases in which this was expressly laid down here (*s*), the mortgagee after obtaining a money decree against the mortgagor, and attaching the mortgaged property, assigned the decree to a purchaser for value. The Court held that as the form of mortgage or charge created by the bond, did not vest any estate in the mortgagee but only established a lien as incident to the money debt, such lien continued an incident of the debt when it passed from a contract-debt into a judgment-debt, and so continued

(*q*) S. D. A. 1860. v. 2, p. 35. p. 164.
See S. D. A. 1858, p. 498: S. D.

A. 1857, p. 953.

(*s*) *Syud Nadir Hossein v. Pearoo*,
14 B. L. R. 425 note, 19 W. R. 255.

(*r*) 1 W. R. p. 315. See *ante*,

when the judgment-debt was subsequently assigned,—otherwise the right to the lien must have remained in the mortgagee. But as the judgment-debt represented the full amount for which the mortgagor and the land were liable, and as the mortgagee had transferred the judgment-debt to a purchaser for full value, the mortgagee could not retain the lien, against either the mortgagor or the assignee of the decree. He could not retain it against the mortgagor, for he had no longer any debt or demand against him or the lands: and as the mortgagor had neither done nor paid anything to discharge the lien, it must still have continued to exist. But the only possible existence it could have would be as incidental to the judgment-debt: and therefore the sale of the money decree passed with it the lien under the bond. The lien could be enforced against the property, only so long as it remained the property of the mortgagor, and by attachment under the decree,—though if the property had before attachment passed into the hands of third persons, a separate suit would have been requisite to enforce the lien against the land in the hands of such third persons.

It was urged in this same case that because the property was situate in the district of Maldah, the Moorshedabad Court (in which the decree had been obtained) could have no power to affect it by its decree. But the Court said,—“The effect of the decree in the Moorshedabad Court was not to create any right against the land, but to turn a contract-debt to which a lien was incident, into a judgment-debt to which, without any operation of the Moorshedabad Court, any already existing lien would attach by reason of its representing the original contract-debt. Moreover, at the date of the sale to the assignee of the decree, the property over which the lien extended had already in fact been attached by the mortgagee under his decree: and it seems clear that an attachment under a money decree on a mortgage bond, and the mortgage lien, cannot co-exist separately in the property hypothecated, and that such an attachment



must be treated, when existing, as an attachment enforcing the lien" (t).

This decision has been followed in several later cases (u). And it must now be taken to be settled so far as the Calcutta Court is concerned, that if a mortgagee, suing on a bond by which lands are mortgaged as security, takes a mere money-decree and under it attaches and sells the mortgaged property, he thereby, so far as he himself and the mortgagor are concerned, transfers to the purchaser the benefit of his own lien and the right of redemption of (i. e., the whole estate remaining in) the mortgagor. If there be no third party interested in the property, the purchaser under the decree takes it absolutely, just as much as if the decree declared the land to be subject to the mortgage. But subsequent incumbrancers, such as a second mortgagee, or one who has purchased the remaining rights of the mortgagor, are not concluded by the proceedings in a suit to which they are not parties, and they are entitled to redeem those above them. Ordinarily, and especially when they are in possession, a separate suit against such claimants under a puisne title will be necessary on the part of the purchaser in order to complete his title and make himself absolute owner of the property.

The latest reported case bearing on this subject, is that of *Bhuggobutty Dossee v. Shamachurn Bose* (v),—though there the suit was on a mortgage in the English form of a house and land in Calcutta. On appeal from a decision of *Phear, J.* sitting in the exercise of the ordinary original civil jurisdiction of the High Court, it was held (w) that a mortgagee is not entitled by means of a money-decree obtained on a collateral security such as a bond or covenant, to obtain a sale of the equity of redemption separately: be-

(t) 14 B. L. R. 425 note : 19 W. 7 Mad. 229.
R. 255 (259). See *ante*, p. 193.

(v) 1 I. L. R. 353.

(u) 14 B. L. R. 408 (F. B.), 23
W. R. 187 : 22 W. R. 98, 360 :
23 W. R. 338, 344, 373, 460. See

(w) *Per Garth, C. J.* and *Pentti-*
fox, J.



cause by so doing he would deprive the mortgagor of the privilege which, upon the principle of considering the estate as a pledge, an English court of equity always awards to a mortgagor, namely, a fair allowance of time to enable him to discharge the debt and recover the estate. This principle is an equitable incident of the contract of mortgage, and it would be inequitable to permit the mortgagee to evade it—or to do that circuitously which he could not do directly.

The Allahabad High Court, however, in a case (from the report of which it is difficult to say precisely how far some of the Judges intended to dissent from the view of the law taken by the Calcutta Court) have held that a purchaser under a mere money-decree, takes only the right, title and interest of the judgment debtor as they stood on the date of the attachment,—and that his purchase is subject to a second mortgage of date prior to the attachment (x).

Of course there is no doubt that a sale in execution of a money-decree obtained by the first mortgagee, does not alter the rights of a second mortgagee or other puisne incumbrancer not a party to the suit—and that a fresh suit will be necessary if the purchaser wishes to enforce against such incumbrancer, the lien of the mortgagee under whom he bought. But it can scarcely, at present, be accepted as law that the purchaser at such a sale takes subject to the subsequent incumbrance any more than did the first mortgagee himself. The Allahabad Court is clearly right in the actual result arrived at, so far as regards the point immediately before it for decision : and in arriving at that result there need not necessarily have been any conflict with the decisions of the Calcutta Court. In selling,—whether under a decree executing a lien, or through an attachment by the mortgagee against the mortgaged property under a money-decree,—the Court ought to sell all it

(x) 1. I. L. R. All. 240 : and see 1 I. L. R. All. 236 also a Full Bench case.



can deal with, namely, the interests of the parties immediately before it. But in neither case can it interfere with the rights of persons not before it. So that if an incumbrancer intermediate between the mortgagor and the first mortgagee is not before the Court, his position remains the same as if no sale had taken place, except that so far as foreclosure and redemption are concerned, he cannot ignore the existence of the purchaser, who represents both the prior mortgagee and the mortgagor. He can sue the purchaser for redemption of the first mortgage which the purchaser has acquired: but the purchaser has as against him any rights which the first mortgagee or the mortgagor would have had. Though in terms selling "the right, title and interest" of the mortgagor, the Court sells so much of the mortgagor's rights as the mortgagor and the attaching creditor could together sell. It acts in truth as the agent of the parties before it, and does all—and can do no more than all—they could do if they were acting together harmoniously without its intervention. And under no circumstances ought the Courts ever to allow the mere equity of redemption of the mortgagor to be sold in execution of a mortgagee's decree, unless it is clear that such a sale is for the mortgagor's benefit, and will secure to the judgment debtor the fair value of his interest in that which is attached (*y*).

In one case it was suggested (*z*) that where A has mortgages over two properties to secure one debt, and B has a second mortgage of only one of these properties, B has a right to insist that A shall proceed to realise his debt in the first instance from the other property, before attempting to realise it from the property which is subject to B's mortgage. There does not, however, appear to be any case in which this principle has been applied in the case of *mofussil* mortgages.

(*y*) 10 B. L. R. 57, and 60 *note*. (*z*) 7 W. R. p. 483. See *ante*, p. 134.

An estate was mortgaged to secure the payment of a certain sum. Another estate was by a subsequent deed mortgaged as a further security for the same sum. It was held that the mortgagee might proceed *first* against the estate which was *last* mortgaged to him, if he chose to do so (a).

When property which is subject to a mortgage, is sold by a third party in execution of a decree which he has obtained, and is sold expressly subject to the mortgage, and there is a surplus after satisfying the decree,—the mortgagee will not be entitled to share in the surplus. This is enacted by section 271 of Act VIII of 1859, a section which refers to a mortgagee who is also an execution creditor. Thus a mortgagee of property which in execution is sold subject to his mortgage, is not entitled to have the surplus proceeds paid out to him in satisfaction of a decree obtained on his mortgage, upon which decree he has issued execution (b).

A mortgagee got a simple money decree for the amount due to him. Another decree-holder attached and sold certain property, *other than that mortgaged*, of the judgment debtor. After satisfying the decree-holder, a surplus remained. It was held that the mortgagee decree-holder was entitled to share with the other decree-holders who had attached, in a rateable distribution of this surplus (c).

When the mortgage debt is payable by instalments, and on default made in respect of one instalment the mortgagee attaches and sells (under the mortgage) the mortgaged property or a portion of it,—and there is a surplus after satisfying that instalment,—it has been held that the mortgagee has a lien on the surplus in respect of the future instalments, so that he can prevent its being distributed among the other (ordinary) attaching decree-holders, although the subsequent instalments are not due (d).

(a) S. D. A. 1858, p. 1176.

(b) 6 W. R. p. 13 (Misc.).

(c) 21 W. R. 86.

(d) 16 W. R. 246. But see 12 B. L. R. 509.



A mortgagee who chooses to waive his lien on the land may come in and share in the surplus, notwithstanding sec. 271 of Act VIII of 1859 (e).

A *talookdar* mortgaged his tenure to his zemindar. Failing to pay his rent, the zemindar sued him under Act X of 1859, and got a decree, and sold the tenure in execution. The auction purchaser got possession. The zemindar then sued and got a decree for the debt due on his mortgage bond, and sought to enforce his decree by again selling the tenure. But it was held that he could not do so: that the sale under the rent-law passed the tenure free from incumbrances: and that the mortgage on it was no longer in existence (f).

A mortgagee was in possession under his mortgage, and a subsequent mortgagee got a decree to sell the property, but subject to the first mortgage. In execution of this decree, peons and other officers of the Court went and took actual possession in order to attach the property, as a step towards judicial sale. The Privy Council held that this was illegal: that no actual seizure should have been made: and that the proper course was to issue and publish a written notice under sections 235 and 239 of Act VIII of 1859 (g).

According to the practise prevailing in the mofussil Courts a mortgagee may become the purchaser of the land for the sale of which he has obtained an order, so long as no case of fraud or collusion is made out against him. In England, that is not so: for a mortgagee can become the purchaser, only by special leave of the Court. And even in this country, the mortgagee ought never to be allowed to purchase either in his own name or *benami*, unless he gives a fair price for the property sold. A mortgagee who desires to buy in his mortgagor's equity of redemp-

(e) 24 W. R. 305: 14 W. R. 200. See *contra* 5 W. R. Misc. 52.

(f) 3 W. R. p. 217.

(g) *Mudhun Mohun Doss v. Gokul Doss*, 10 Moore 563, 5 W. R. P. C. p. 91.



tion requires to proceed with great caution, or he may find himself involved in difficulties. For where there are subsequent incumbrancers, the position of the first mortgagee may become one of great complication if he has bought up the mortgagor's remaining interest in the property.

It may be observed that a mortgagee by obtaining a mere money-decree may be held seriously to affect his lien on the mortgaged property. For, supposing the mortgage to carry interest at a rate higher than the Court rate,—as after the money decree his debt would carry interest only at the rate allowed by the Court, it is probable that his lien would continue only for the same rate (*h*).

II. In a case of mortgage by bye-bil-wufa, kut-kubala, or conditional sale, foreclosure cannot be obtained until certain forms prescribed by law have been gone through; and these forms must be strictly complied with, any failure in this respect proving fatal to the whole proceeding.

The law on the subject, as established by the Regulations and the practice of the Courts in Bengal, is thus summed up by the Privy Council in the case of *Forbes v. Ameeroonissa* (*i*):—"Up to the year 1806, the rights of the holder of a bye-bil-wufa were enforceable according to the strict terms of the contract. It was necessary for the mortgagor, if he wished to save his estate from forfeiture, to tender the amount due, or to pay it into Court, pursuant to the provisions of Regulation I of 1798, within the stipulated period for the repayment of the loan. Regulation XVII of 1806 first introduced a modification of the strict rights given by the contract, analogous to, though by no means identical with that which Courts of Equity have long imposed on mortgagees in this country. The 7th section of that Regulation extended the period within which the mortgagor might redeem, to any time within

(*h*) See *The European Central Railway Co., ex parte The Oriental Financial Corporation* L. R. 4 Ch. D. 33.

(*i*) 10 Moore 340, 5 W. R. P. C. 47.



one year from and after the application of the mortgagee to the Zillah Court under the following section. And that section, being the 8th, provided that a mortgagee, desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent was repaid, should, after demanding payment from the borrower or his representatives, apply for that purpose by a written petition to the zillah judge, who should cause the mortgagor to be furnished with a copy of the application, and notify to him, that if he did not redeem the property in the manner provided by the preceding section, within one year from the date of the notification, the mortgage would be finally foreclosed and the conditional sale made absolute. Hence, when these proceedings have been had, it becomes incumbent on the mortgagor to take, within the year, the steps towards redemption which are prescribed by the 7th section. Within that period, he must either pay or tender (and the proof of such payment or tender will lie on him) the sum lent, or the balance due if any part of the principal has been discharged, and also in the case in which the mortgagee has not been put into possession of the mortgaged property, any interest that may be due; or (and this is the alternative commonly adopted) he must make a deposit pursuant to section 2 of Regulation I of 1798. That enactment, of which the object was to relieve mortgagors seeking to redeem, from the difficulties of proving a tender, by enabling them to pay the proper amount into Court, thus prescribes what the deposit is to be :—“When the lender has not obtained possession of the lands, the deposit is to be the principal sum lent with the stipulated interest thereon; but if the lender has held possession of the land, the principal sum borrowed need only be deposited, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. In either of these cases, the deposit preserves

to the borrower his full right of redemption, and entitles him to immediate possession of the land, if that is in the possession of the lender, subject to the adjustment of the accounts.' A third case is then provided for as follows :—' If the borrower in any case shall deposit a less sum than above required, alleging that the sum deposited is the total sum due to the lender for principal and interest after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and notice given to the lender as above directed, and if the amount so deposited be admitted by the lender, or be established on investigation to be the total amount due to him, the right of redemption shall be considered to have been fully preserved to the borrower, who will not, however, in such cases be entitled to the recovery of the lands until it be admitted or established that he has paid the full amount due from him.' The 3rd section prescribes the manner in which the lender is to account in those cases in which an account shall be necessary. The general effect of the Regulations is, that if anything be due on the mortgage and the mortgagor makes an insufficient deposit, and *a fortiori* he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The title of the mortgagee, however, is not even then complete. It was ruled by the Circular Order of the 22nd July 1813, No. 37, and has ever since been settled law, that the functions of the Judge under Regulation XVII of 1806, section 8, are purely ministerial, and that a mortgagee, after having done all that this Regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession. In that suit the mortgagor may contest on any sufficient grounds the validity of the conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is



due, or that the deposit (if any) which he has made is sufficient to cover what is due ; but the issue, in so far as the right of redemption is concerned, will be, whether anything at the end of the year of grace remained due to the mortgagee, and if so, whether the necessary deposit had then been made. If that is found against the mortgagor, the right of redemption is gone."

The first thing (*j*) to be done by a mortgagee by conditional sale wishing to foreclose, that is to say, to have the sale to him declared absolute, is to demand payment of what is due on the mortgage, from the borrower or his representative. And it is not necessary that the demand should be for the specific sum ultimately ascertained to be due (*k*). If the application is unsuccessful, he must present a written petition to the judge of the district in which the mortgaged property is situated, stating that the petitioner is mortgagee by conditional sale of the property in question, that a certain sum is due to him for principal, with a sum for interest and costs, that the petitioner has made a demand for payment but without effect,—and that therefore he wishes to have his sale made absolute, to be put in possession, and to be registered as proprietor.

On receiving this petition, the judge will cause the mortgagor or his legal representative to be furnished as soon as may be with a copy of it, and also with a notice or perwannah under his seal and official signature, notifying to him, that if he does not redeem the property mentioned in the petition within one year, the mortgage will be finally foreclosed, and the conditional sale made absolute.

The judge will act upon the petition of one who professes to be the mortgagee of property within his jurisdiction, without making any inquiry as to the truth of its contents, or even as to the existence of a mortgage at all. And the production of the original deed of mortgage, prior to the

(*j*) Reg. XVII. 1806, Sec. 8.

Moore 340, 5 W. R. P. C. 47.

(*k*) *Forbes v. Ameeroonissa*, 10



issue of notice of foreclosure, is not necessary (*l*). Nor need the mortgagee produce his accounts in these preliminary proceedings (*m*). But a judge may if he pleases satisfy himself, by requiring the production of the document, that the applicant for foreclosure is the "receiver or holder of a deed of mortgage" (*n*).

A copy of the mortgagee's application to foreclose, must accompany the notice issued by the judge to the mortgagor or his representative; but it is not required, that he should be served with a copy of the mortgage agreement (*o*).

And the foreclosure is not complete, and the Courts will not give effect to it, unless a copy of the mortgagee's written application has been properly served on the mortgagor (*p*). In one case, however, it was held that when the mortgagee had been some years in possession after foreclosure, the mortgagor, who had full notice of the fact, could not come in and redeem, on the allegation that the proceedings were irregular inasmuch as a copy of the mortgagee's petition was not served along with the notice. The irregularity was taken to have been waived (*q*).

The notice from the judge to the mortgagor must issue from the court of the district in which the mortgaged property is situated at the time of issue: and if this rule is not attended to, all the subsequent proceedings will be bad (*r*). But it appears that when the lands lie in several zillahs, a notice applicable to the whole lands, but issued from only one of the courts which have jurisdiction, is sufficient; and it is not necessary either that a separate notice should issue from each one of the courts, or that leave should be obtained from the High Court to issue one notice which may suffice for all the property in dispute. In the case of

(*l*) Rep. Sumn. Cases, 8th Sept. 1840.

(*m*) *Forbes v. Ameeroonissa*. 10 Moore 340, 5 W. R. P. C. 47.

(*n*) Ch. Gr., 5th June 1848, 831. 46.

(*o*) Cons. 630, 11th March 1 No.

(*p*) 20 W. R. 363; 22 W. R.

90.

(*q*) W. R. 1864, p. 36.

(*r*) S. D. A. 1847, p. 485. Reg. XVII. 1806, Sec. 8.



Rasmuni Dabee v. Pran Kishen Das (s), the mortgage deed on which the suit was founded, described the whole lands as situated in zillah Moorshedabad, and out of the Court of that zillah notice of foreclosure was issued. The Collector was a party to the suit, and objected that part of the lands being in zillah Beerbhoom, the notice was incomplete. To this the mortgagee pleaded an order, of date subsequent to the notice, obtained by him from the Sudder Court, for the trial of the cause in the Court of Moorshedabad. Upon these facts, the Privy Council in giving judgment remark: "What is there to show in the whole course of these proceedings, that these lands were not situated partly in one, and partly in the other district; and what is there to show in the course of the proceedings, that if that were the case, an order (*i. e.* notice of foreclosure) made in the court of either district, would not be a proper order? We think that there is nothing in this case to show that the order was not made in a proper Court."

Judges are required to pay particular attention to prevent any unnecessary delay in issuing these notifications. The mortgagee therefore, on filing his application, should be directed immediately to deposit the *tulubana* of the peon through whom the notice is to be issued to the other party, that the order for issuing the same may be passed without delay.

The period of one year, during which the mortgagor may redeem, must be calculated from the "date of the notification" (*t*). It used to be held that the year allowed by law, counted from the date of issue of the notice, not from the date of *service* on the mortgagor. Thus, the date of issue being the 28th May 1841, and the date of service the 17th June, the year counted from the 28th May (*u*). So that if the notice of foreclosure were not *served* on the

(s) 4 Moore 392, 7 W. R. P. C.
66. See S. D. A. 1859, p. 848.
(t) Reg. XVII. 1806, Sec. 8.

(u) 7 Sel. Rep. 264. S. D. A.
1846, p. 282: 1858, pp. 627, 1477.
9 W. R. 116. See 3 W. R. 230.



mortgagor until the last day of the year of grace, he would have no time at all left him for redemption.

But this is no longer so, the former decisions on the question having been expressly overruled in 1868 by a Full Bench,—*Peacock*, C. J. observing, “there would be but little equity in allowing a mortgagor to redeem his estate within one year from the date of a *perwannah* not served upon him, or of which he should have no notice at all, or no notice until the period of one year from the date of the *perwannah* should have actually expired or be upon the eve of expiration. I apprehend that the legislature intended that the mortgagor should have one year to redeem from the time at which it should be made known to him that the mortgagee had applied to foreclose” (*v*).

Notice is to be given to the mortgagor or “his legal representative.” These words are to be strictly construed, and care must be taken that all proper parties have had notice.

Notice to the person who on the face of the deed appears to be the mortgagor, or to his representative, is all that is required: and a change during the year of grace, in the parties entitled to redeem, does not make any further notice necessary. Thus if *after* notice has been duly served on the mortgagor, he transfers his interest, no fresh notice need be given to the transferee (*w*). So if *after* due service of the notice, the mortgagor on whom it was served becomes insolvent and files his schedule in the Insolvent Court, no further notice is necessary (*x*). When A mortgaged land, B witnessing the deed, but being in reality a co-mortgagor with A, it was held that notice to A was sufficient, although the mortgagees were cognisant of the fact that B also was in truth a mortgagor (*y*). So it would seem that A having mortgaged lands in the name of his son B, notice to B would be considered sufficient: and that

(*v*) 1 B. L. R. F. B. 14.

(*y*) S. D. A. 1849, p. 36. See

(*w*) S. D. A. 1857, p. 957.

S. D. A. 1856, p. 923.

(*x*) S. D. A. 1858, p. 323.



this notice, having been served during A's life-time, would be binding upon other parties who, along with B, had on A's death during the year of grace become his "legal representatives" (z).

If the mortgagor is dead, the notice must be served on his legal representative: and it is not enough to serve one who is in possession as legal representative but who afterwards turns out not to be the true heir (a).

There formerly was some uncertainty as to how far subsequent assignees of the mortgagor were his representatives so as to require notice to be served on them (b).

But there can now be no doubt that notice must be given to every one who (by whatever means) has come, *before* the issue of notice, to occupy the position of the mortgagor relative to the mortgagee, in respect of the property the subject of the mortgage. In one case it was said (c)—“what is the meaning of the term ‘mortgagor’s legal representative?’ I conceive the words naturally designate that person who, either by law or by contract between the parties, succeeds the mortgagor, whether mediately or immediately, in the position which he holds relative to the mortgagee in respect of the property which is the subject of the mortgage; and with this view I believe all the published decisions of this Court accord, as well as those of the late Sudder Court. Now a succession of this kind may occur either by reason of the death of the mortgagor, or by assignment of the equity of redemption, as a consequence of insolvency, execution of a decree of Court, or voluntary contract: only it should be observed that in the latter cases the assignment must not be inconsistent with the terms of the original mortgage, and must generally be assented to by the mortgagee, or, in other words, must be such as the

(z) S. D. A. 1852, p. 423.

(a) 22 W. R. 168. See 17 W. R. 230.

(b) S. D. A. 1847, p. 499: 1853,

p. 859: 1854, p. 1. N. W. P. v. 6, p. 210: v. 9, pp. 1, 371, 421. Marsh. 292.

(c) 3 W. R. 230, *per* Phear, J. So, 6 W. R. 230.



mortgagee is bound to recognize. When the mortgagee desires to foreclose, there can never be the least practical difficulty in ascertaining whether the equity of redemption, as against the mortgagee, is in the hands of the original mortgagor himself, or in those of one of the substitutes for him just described ; and in whichever of these it is found to be, to that one, in my judgment, the notice must be issued in order to initiate the year of grace, whether it was by public or private sale, or otherwise, that the assignee in question obtained his right to the assignment. But when once the time of grace is set running, no subsequent assignment of the equity of redemption will stop it. If, therefore, in the case before us, the equity of redemption was duly and completely assigned in such a way as to bind the mortgagee *before* the notice of foreclosure, then the notice is not sufficient, which has not been issued to the assignee ; but, if the assignment took place *after* the notice to the mortgagor, then no notice to the assignee is necessary, and the mortgagee ought to have the benefit of his proceedings."

In the case of *Mohun Lal Sookool* (d) the mortgagees when they issued their notice of foreclosure, not only had notice that the interest of the original mortgagor had been attached in execution, but were actively disputing the right of the decree-holders to put up that interest for sale. There had been a decision against their objections, and their appeal against that decision was pending. The appeal was decided against them on the 8th of January, and the equity of redemption was sold to the appellants on the 7th of April 1851. The Privy Council held it was clear that if the sale had taken place before the notice of foreclosure was filed, that notice, to be effectual, must have been served on the purchaser : and that in the circumstances above stated, it ought to have been served upon the decree-holder.

(d) 10 Moore, 14, 1 W. R. P. C. 3 B. L. R. n. j. 172.
19. So 15 B. L. R. 28, 34 note :



A purchaser from the mortgagor completed and registered his purchase on the very day on which the notification was made over to the peon for service. It was held that he was the legal representative of the mortgagor and as such ought to have been served. But in this case it was clear that the mortgagee had notice of the transfer: for he was actually an attesting witness to the mortgagor's signature of the deed of conveyance to the purchaser (e).

A second mortgagee is entitled to notice of foreclosure (f); but not if the second mortgage was made during the pendency of the foreclosure proceedings (g).

When the mortgagor's representative was a minor, and notice was served on certain persons who were believed to be, but who were not in fact, his guardians, the notice was bad (h). A mortgagor by deed directed that his widow should possess his zemindary (half of which was under mortgage), and enjoy it during her life-time: he granted permission to her to adopt a son, and directed that on her death, such adopted son should inherit all his property: and he desired her to pay off his mortgage debt, by selling or mortgaging any portion of his zemindary. Under this authority, the widow did adopt a boy as son to her deceased husband. The adopted son was a minor, and under the guardianship of the widow. Service of notice of foreclosure on the widow, was held to be sufficient, without notice to the son (i).

When the estate is under the control of the Court of Wards, by which a guardian and manager is put in possession, notice ought to be served on such guardian and manager; and the Collector of the district, as representing the Court of Wards, should be a party to the proceedings. If a new manager or guardian is appointed after issuing

(e) 23 W. R. 25.

(f) 22 W. R. 475.

(g) See 11 Bom. 24, 64. S. D. A. 1857, p. 957: 1858, p. 323. "

(h) 6 N. W. P. 278. 21 W. R.

428: 22 W. R. 168.

(i) *Rasmoni Dabee v. Frankishen Das*, 4 Moore, 392, 7 W. R. P. C. 66.



the notice, he must be substituted for the original one in all future proceedings (*j*).

Personal service on the mortgagor, of the notice of foreclosure, is not absolutely necessary. The service should of course be personal, if possible. If it be impossible, the notice must be served in such manner as the law would require any other process of the Court to be served under similar circumstances (*k*). In one case the Court said,—“the notification is not merely a preliminary proceeding leading up to a judgment of foreclosure to be subsequently pronounced in Court. It not only fixes the date from which the period during which the mortgagor is to retain the right to redeem is to be computed, but it is of itself the operative act in the foreclosure proceeding. We think, therefore, that the service of the notice must be evidenced by the clearest proof, and must in all cases be, if not personal, at least such as to leave no doubt on the mind of the Court, that the notice itself must have reached the hands, or come to the knowledge of the mortgagors. Not only do we find from the evidence of the witnesses that the notice was not duly served, but we find that, up to the present time, the mortgagee has continued to pay in the Government revenue in her capacity as mortgagee, and designated herself as such in her *chabans*. Now, had the foreclosure been actually completed, it is most improbable that she would have failed to have her name entered as proprietor in the Collector's register” (*l*).

The judge must not be satisfied without really good evidence of due service of the notice. And where it is alleged that there has been no proper service, he ought to dispose of the question fully and explicitly, so that the position of the parties may not be left doubtful (*m*).

(*j*) *Rasmoni Dabee v. Frankishan* 1855, p. 8. N. W. P. v. 8, p. 400 ;
Das, 4 Moore, 393, 7 W. R. P. C. 66. 1860, pp. 34, 38.
And see *Prannath Roy Chowdry's* (*l*) W. R. 1864, p. 49.
case, 7 Moore, 323, 4 W. R. P. C. 37. (*m*) S. D. A. 1852, p. 557.
(*k*) S. D. A. 1854, p. 281. So,



In one instance, in which the notice was returned with a report that as the parties named in it could not be found, a proclamation had been affixed at the judge's cutcherry and the residence of the parties,—this was reckoned to be insufficient; and it was said that the strict letter of the Regulation must be followed, and that the Regulation did not provide for the substitution of a proclamation, in such a case (*n*). Apparently, however, it was not proved that any effort had been made to serve the mortgagor personally: at any rate, this case is over-ruled by the later decisions cited above.

Nine out of eleven sharers made a mortgage of the whole joint property. The remaining two afterwards gave their consent in writing to the mortgage. Notice of foreclosure was served on the *nine* only. But it was held that this was, under the circumstances, sufficient notice to *all* the eleven (*o*).

The mere fact of cognizance on the part of the mortgagor, or his representative, that the property is liable to foreclosure, or cognizance of the steps which the mortgagee has been taking, will not absolve the mortgagee from the necessity of strict compliance with the requisitions of the law as to issuing and serving the notice of the application to foreclose (*p*).

The objection that notice has not been duly issued is by no means a *technical* objection (*q*).

The notice to redeem, gives no efficacy to transactions not in themselves legal: and the non-appearance of the mortgagor within the prescribed year, does not bar him from disputing the contract, or from proving it to be void or voidable (*r*). The mortgagee must establish his case like any other plaintiff.

Notice under sec. 8, Reg. XVII, 1806 being issuable on

(*n*) 6 N. W. P. 278. See S. D. A. 1858, p. 1775.

(*o*) S. D. A. 1854, p. 511.

(*p*) 6 N. W. P. 210, 278.

(*q*) S. D. A. 1858, p. 1775. See 20 W. R. 363: 22 W. R. 90.

(*r*) 5 Sel. Rep. 81. S. D. A.

1851, pp. 211, 648.

application, without any sort of inquiry into the merits of the case, and without any intimation being given to the supposed mortgagor of the intention to make such application, no publicity can be considered to attach to its issue. The fact that a man has caused notice of foreclosure to be issued, is not in any way to be taken even *prima facie* as affording a presumption of his good faith (*s*). And the mortgagee's having served an occupant of the mortgaged lands with notice, is no admission of that occupant's right to redeem (*t*).

Notice of foreclosure having been issued, the mortgagor or his representative must take care, within the year of grace, to tender to the mortgagee, or to deposit in Court (which is always the safer plan), the whole amount of principal and interest, or if the mortgagee has had the usufruct of the land, the amount of the principal only which is due. If no rate of interest has been agreed upon, it must be deposited at the rate of twelve per cent. ; and no local custom can make a deposit at a lower rate of any use (*u*).

The principal debt and the interest due are all that need be deposited within the year of grace. It is not essential that costs incurred by the mortgagee in the matter of the mortgage should also be deposited (*v*).

It has been already shown that the tender must be made in money, but that if the mode of re-payment agreed on in the original contract is more favorable to the mortgagor than that provided by the Regulations, a tender made according to the contract is sufficient (*w*). Thus nothing being said in the mortgage deed as to interest, a deposit of the bare principal was held sufficient (*x*). But whatever stipulations to the contrary have been made, a tender or deposit in strict compliance with the terms of the Regula-

(*s*) S. D. A. 1848, p. 36.

(*v*) Marsh. 167.

(*t*) *Prannath Roy Chowdry's* case, 7 Moore 323, 4 W. R. P. C. 37.

(*w*) *Supra*, p. 158, 159. Reg. XXXIV 1803, Sec. 14.

(*u*) Reg. I. 1798, sec. 2. S. D. A. 1850, p. 284.

(*x*) W. R. 1864, 157.



tions, is all that is necessary. Therefore where the mortgagee had been in possession, a deposit of the principal was held sufficient to prevent foreclosure, although the mortgage deed contained a covenant that the mortgage should be foreclosed, unless certain sums due for improvements, as well as the principal sum lent, were paid off within the year of grace (*y*).

Where it had been agreed between the parties, that a sum due from the mortgagee should be set off against so much of the mortgage debt, a deposit by the mortgagor of what remained due from him, after making the deduction, was held to be sufficient. But a mortgagor who makes a tender of this sort runs a very great risk, and ought to be very sure of his ground before he does so. For it has been held that if the sum tendered or deposited falls short, though it be only to the extent of one rupee, of the amount due, the mortgagor's right is, on the expiry of the year of grace, wholly gone (*z*). The general principle of the Regulations is that if any thing be due on the mortgage, and the mortgagor makes an insufficient deposit,—and *a fortiori* if he makes no deposit at all,—the right of redemption is gone at the end of the year of grace (*a*).

The tender or deposit must be made within a year from the date of the service of the notice of foreclosure. But if the last day of the year of grace happens to be a Sunday or other holiday, a deposit on the first ensuing business day will be sufficient (*b*). In one case, the last day for payment was the 25th of November. On that and several subsequent days, the Court was improperly closed by the judge on account of the Sonapore Fair. It was held (*c*)

(*y*) 8 N. W. P. 161.

(*z*) 8 N. W. P. 447. See 10 N. W. P. 580: S. D. A. 1859, pp. 127, 842: Marsh. 45.

(*a*) *Forbes v. Ameeroonissa*, 10 Moore 340, 5 W. R. P. C. 47.

(*b*) N. W. P. v. 10, p. 580: v.

7, p. 60. S. D. A. 1858, pp. 627, 1477. Rep. Sum. cases, 15th July 1841. 7 Sel. Rep. 264. But see *contra*, 9 W. R. 583.

(*c*) 8 W. R. 223. See 4 B. L. R. F. B. 32.

that the mortgagor saved his estate from foreclosure by depositing the money in Court on the first day on which the Court was open after the 25th of November. It was held also that the mortgagor was under no obligation to make a private tender, on the 25th of November, of the amount due. This was a case in which the mortgagee had given an extension of time. But the same rule would apply when the Court was improperly closed on the last day of the year of grace.

The judge has no discretion to extend the time given to the mortgagor by the Regulation: and an order of the judge giving the mortgagor four months additional time was set aside by the High Court (*d*). But when the mortgagee has himself granted an extension of time, a deposit or payment made before the expiry of the time so extended is sufficient (*e*). And such giving of time does not injure the foreclosure or make it necessary for the mortgagee to issue fresh notice (*f*).

When a sum of money is brought for the purpose of being deposited in Court, it ought to be received, whatever its amount: and its receipt should be notified to the mortgagee. It is the duty of the judge, when money is deposited, himself to grant a receipt for it to the mortgagor, and to issue notice to the mortgagee that the money has been deposited (*g*). And it has been said that it is irregular for the Court to make a report as to the insufficiency of the tender, and the amount required (*h*).

The tender or deposit must be made unconditionally, and if it is fettered with any restrictions, it is bad,—as was held in a case where the deposit was accompanied by a denial of the mortgagee's title, and notice that a suit would be brought to recover the money tendered (*i*).

(*d*) 5 W. R. Misc. 31.

(*e*) Marsh. 167. 8 W. R. 223.

(*f*) 20 W. R. 176.

(*g*) 8 W. R. 223.

(*h*) 10 N. W. P. 580.

(*i*) *Prannath Roy Chowdry's* case, 7 Moore 323. 6 W. R. 225 (the decision of a Full Bench overruling 3 W. R. 184). See also Marsh. 45, W. R. Sp. p. 14.



The mortgagors some weeks before the expiry of the year of grace, applied for leave to deposit the money in Court, subject to a condition that it should not be paid to the mortgagee, but should be kept in Court until a regular suit disputing his claim could be brought. The judge gave the permission asked for, and received the money so conditionally deposited. The day after the year of grace came to an end, the judge called upon the mortgagors to take away their money, remarking that such a conditional deposit was not allowable; and he afterwards declared the conditional sale to have become absolute, because the money had not been paid or deposited within the year. On appeal, the majority of the Court held that there was no sufficient deposit, and that the acts of the judge formed no bar to the foreclosure of the mortgage (*j*).

So, when the mortgagor restrained the payment to the mortgagee of money deposited, pending the result of a redemption suit which he was about to bring, and the year of grace expired without any unconditional deposit being made, and the redemption suit failed, the mortgage was declared foreclosed as if there had been no deposit (*k*).

A mortgagee demanded a larger sum than was really due to him. The mortgagor paid into Court the sum he asked for, stating that he did so merely to obviate all objections, and not as admitting it to be due. The mortgagee having taken it all out of Court, the mortgagor sued for and recovered what he had taken in excess of that to which he was entitled (*l*).

The petition on which the mortgagor paid in the deposit stated that there was then pending another suit in which the mortgagor had sued the mortgagee for possession on the ground that the latter had realised both principal and interest from the usufruct and was entitled to no further payment from the mortgagor. No condition was annexed to the deposit: the mortgagor, admitting the mortgage,

(*j*) S. D. A. 1847, p. 462.

(*l*) S. D. A. 1855, p. 54.

(*k*) S. D. A. 1848, p. 897.

paid in the money to prevent foreclosure. It was held that this was a good deposit, as the mortgagee might have taken the money out of Court if he had chosen (m).

The tender or deposit ought to be made in one sum, not by instalments. At least, it is to the mortgagor's advantage to pay in one sum, as his position is in no way benefited by the payment of any thing less than the whole amount due : and if he chooses to make several deposits on different dates, he will not be allowed interest on any of them, except from the date on which the demand was discharged in full, and due notice given to the mortgagee. The mortgagee is not obliged to receive sums deposited on account, until the whole is paid in ; he defeats his own claim by accepting them, as his taking out of Court a sum paid in by the mortgagor, is an acknowledgment that such sum is in full discharge of all monies due in respect of the mortgage debt (n).

If the mortgagor admits the claim of the mortgagee, and has not the means of paying what is due to him, he may put him in possession of the property, and without waiting till the end of the prescribed year, present a petition to the Court from which the notice issued, stating his inability to pay, and that he has made over possession to the mortgagee. And such a proceeding, if possession is actually given to the mortgagee, has apparently the same effect as a decree for possession on foreclosure, made in a regular suit. Probably, however, one who had purchased *bond fide* from the mortgagor before the presentation of the petition, might, notwithstanding, redeem at any time during the year of grace. And if possession is not delivered over to the mortgagee, the mortgagor's having filed such a petition, will not bar the right of any one who under ordinary circumstances would have been entitled to redeem, except that the mortgagor himself would pro-



bably be held to be bound by his own act, and to be foreclosed (o).

In like manner, the mortgagor, without any proceedings whatever being taken in Court, may convey absolutely to the mortgagee, the property already conveyed to him conditionally. But in such a case, the mortgagee must be prepared to prove that the conveyance *out and out* has been fairly and properly obtained : and he ought at once to assert his rights as proprietor, and should no longer allow his name to appear as mere mortgagee (p).

It has been held that it is not absolutely necessary that there should be any written agreement, in order to convert a conditional into an absolute sale, even though the conditional sale itself was in writing : and that any thing which proves that the mortgagor has agreed to the sale being made absolute, is sufficient. A suit was brought for possession of land which had at first been conditionally sold to the plaintiff, but which, it was alleged, had been afterwards absolutely conveyed to him. The plaintiff did not prove any positive contract making the sale absolute : but he produced from his own custody, the ikrars given by him to the defendant, declaring the sale to be only conditional, and he gave evidence to the effect that these had been delivered up to him by the defendant, on the payment to him of a further sum of money. It was held that there was conclusive evidence of an unconditional sale, and that, the plaintiff must have his decree (q).

But a mortgagee ought for his own security either to insist upon having a regular decree of Court declaring the mortgage foreclosed, which undoubtedly gives him by far the safest title, or, if he chooses to have the sale made absolute without going into Court, he should see that the conveyance to him is made by a deed duly executed and registered.

(o) S. D. A. 1849, p. 311.

(q) 7 Sel. Rep. 181. 2 Agra,

(p) 8 N. W. P. 273. See S. D. 176. But see W. R. Sp. p. 79.

A. 1856, p. 948 : W. R. Sp. p. 79.

If the mortgagor, or his representative, makes a tender or deposit within the year of grace, it remains for the mortgagee to consider whether or not he will accept the sum so tendered or deposited. He will accept it only if it covers the whole of his demand, as he cannot take it out in part payment and continue his suit for foreclosure, or for payment of what remains due.

If the mortgagee takes the money out of Court, he cannot draw back afterwards on the ground that the money was deposited after expiry of the year of grace,—or on any other ground (*r*).

If the mortgagee is ready to receive the sum deposited, the judge in whose Court it has been placed will immediately pay it over to him; if he refuses to receive it, the judge will restore it to the person who deposited it. The mortgagor who has tendered or deposited a sufficient sum, or a sum which is accepted as sufficient by the mortgagee, being in exactly the same position as one who has come forward to redeem and made a deposit or tender for that purpose under Reg. I of 1798, sec. 2, is entitled to possession summarily without suit (*s*). And the mortgagee, on applying to take the money out of Court, must surrender the mortgage deed, or show satisfactory cause for his not doing so (*t*).

Up to this point, the functions of the judge, in proceedings taken for foreclosure, are purely ministerial, he having merely, without instituting any inquiries into the merits of the case, or expressing any opinion as to them, to issue on the application of the parties certain fixed notices and orders,—to receive, and pay over to the mortgagee if desirous of taking it, whatever amount may be paid into Court by the mortgagor, or if the mortgagee should refuse to accept the same, to restore it to the mortgagor,—and to receive proof of service of the several no-

(*r*) 6 W. R. 249.

(*t*) See 7 Sel. Rep. 260; and

(*s*) Cir. Ord., 22nd July 1813.

supra, p. 171.



tices. And it is the duty of the judge to confine himself to recording simply the facts which have occurred during the summary process, and to abstain from expressing any judicial opinion whatever on the proceedings. All questions as to their effect or as to the legality or validity of the alleged mortgage, or even as to the existence of a mortgage at all, must be left undecided at this stage, and form the subject of a regular suit to be subsequently instituted (u). But so far as the mere issue and service of the notice are concerned, he is to inquire and record judicially that all has been done properly (v).

After the lapse of the year of grace, in the event of the proper sum, or such a sum as is accepted by the mortgagee, not being deposited or tendered, the mortgagee who wishes to complete the foreclosure must institute a regular suit to have the conditional sale declared absolute, or, if he has not had the usufruct, for possession of the mortgaged land, as on a conditional sale become absolute (w).

To succeed in his suit, the mortgagee must prove that all the legal formalities have been observed, that notice was issued from the proper Court, that it was duly served on the right parties, that the period of a year from the service of it has elapsed, and that no sufficient tender or deposit was made before the expiration of the year of grace. Without proving all these points he cannot obtain a decree, whether the defendant pleads that there has been any irregularity or not,—not even if the case is tried *ex parte*. If service of the notice is denied, it must be proved independently of the mere copy of the foreclosure proceeding. Witnesses must be called to prove the service (x). The Court is not justified in overlooking any error in the summary proceedings, although its attention is not called to it

(u) *Forbes v. Amceroonissa*, 10 Moore 340, 5 W. R. P. C. 47. See 9 N. W. P. 234.

(v) 7 W. R. 123.

(x) 1 Agra, 172. See 3 W. R.

(w) *Forbes v. Amceroonissa*, 10 Misc. p. 11.

by the parties most interested (*y*). So also the mortgagee must establish that, on the merits of the case, he is entitled to what he claims: for, as has been seen above, the mere issue of notice, and the proceedings in connection therewith, give no sort of validity to his claim, and if he cannot show a good title as mortgagee, his suit must be dismissed (*z*).

The mortgagor's not coming forward in Court, or taking any steps to protect himself during the year of grace, does not in any degree debar him from appearing in the mortgagee's suit for possession, and raising any plea on the facts and merits of the case: and the judge is bound to investigate and decide the case on its merits, notwithstanding that no objections to the conditional sale were preferred till more than a year after service of notice of foreclosure (*a*). But any defence which the mortgagor sets up must have existed prior to the expiry of the year of grace,—the one great question in all foreclosure suits being, whether the mortgagee was on that date entitled to foreclose or not. With that year ends the mortgagor's whole interest in his property, unless he can prove that previous to its lapse he was entitled to have it declared by the Court that the mortgage had been satisfied.

If the mortgagor takes no steps to redeem within the year, from the knowledge that the debt has been fully paid, and that therefore the mortgage cannot be foreclosed, he must nevertheless appear and defend a suit brought by the mortgagee to have the sale declared absolute and to obtain possession. If he does not do so, and a decree is made against him, it will be binding on him.

When the contract was made before the passing of Act XXVIII of 1855, the lender on a mortgage by conditional sale, who has been in possession and in the enjoyment of the

(*y*) 5 Sel. Rep. 346. S. D. A. 1847, p. 485: 1853, p. 221.

(*z*) See *ante*, pp. 219, 220. Sel. Rep. 81. S. D. A. 1851, p. 648. See 1 Agra, F. B. 102.

(*a*) S. D. A. 1848, p. 6: 1851, pp. 211, 648. *Forbes v. Ameersoonissa*, 10 Moore 340, 5 W. R. P. C. 47; and see 6 W. R. 69.



usufruct of the land, must account to the borrower for the proceeds of the estate whilst in his possession. But an account is not necessarily to be taken in *every* such case: for example, it need not be taken if it is admitted on the face of the mortgagor's answer that something is still due from him. The obligation to account depends on the circumstances of the case and the nature of the issue raised (*b*).

And the rule that the mortgagee must account, does not apply to the mortgagee's possession after the lapse of the year of grace, if the notice issued is followed, within twelve years from the time when the mortgagee could first have sued, by a suit for foreclosure. In such cases, in a suit by a mortgagee to render absolute a conditional sale, the mortgagor may plead that prior to the expiry of the year of grace, the amount borrowed, together with the legal or stipulated interest, had been realised by the mortgagee from the usufruct of the property; and on this plea he is entitled to have an account from the mortgagee. But this defence will be of no avail unless on the taking of the accounts it appears that the whole sum due (including both principal and interest) had been realised before the close of the year of grace (*c*).

The Court is not to decree in favor of the mortgagor *simply* because the mortgagee does not produce his accounts. The Court must examine the mortgagor's accounts and see whether they support his case, before deciding in his favor (*d*).

A mortgagee in possession foreclosed, and continued to remain in possession. The mortgagor ousted him, and the mortgagee sued to recover possession. The mortgagor defended the suit, and pleaded that before the foreclosure

(*b*) *Forbes v. Amecroonissa*, 10 Moore 340, 5 W. R. P. C. 47.

(*c*) *Forbes v. Amecroonissa* ubi supra. Reg. I. 1798, Sec. 3. S. D. A. 1857, pp. 96, 234: 1858, pp. 727, 757, 1235, 1525, 1691: 1859,

p. 127. See *ante*, pp. 179, 180.

(*d*) See *Shah Mukhum Lall's case* 12 Moore 157 (198), 2 B. L. R. P. C. 44. S. D. A. 1858, p. 757: 1859, p. 490. 7 W. R. 82: and see next Chapter.

the mortgagee had received from the usufruct more than the whole sum to which he was entitled. It was ruled that the mortgagee must account in the usual manner (e). So, the mortgagee was forced to account, when he had had possession not avowedly but through a *benamee* farm to his nephew (f).

If the mortgagee, not being entitled to possession, wrongfully enters, he is just as liable to an account as if he had been in under his mortgage (g).

A mortgagee, who enters into a compromise with his debtor, and acknowledges in Court that he is satisfied, and renounces his right to foreclosure, cannot afterwards change his mind, and sue for foreclosure. During the progress of a foreclosure suit, the mortgagee made a compromise with the mortgagor, and filed a *soolenamah*, renouncing all further claim to possession. He afterwards brought a fresh suit for possession on foreclosure, on the ground of non-performance of the terms of the compromise: but it was dismissed by the Court, which held that his rights as mortgagee were no longer in existence. In such a case, the remedy would probably be by a suit based on the compromise (h).

And so, a decree for foreclosure cannot be set aside on the ground that the mortgagor allowed the decree to go against him without offering any opposition, in consequence of the mortgagee's having executed a deed, during the year of grace, in which he covenanted to restore the mortgagor to possession on certain conditions, which covenant he had broken (i).

In one case, the year of grace expired in November 1872, but the mortgagee gave the mortgagor an extension of time up to March 1873, within which to pay off the mortgage debt. After making that arrangement, the mortgagor

(e) S. D. A. 1858, p. 1525.

(f) S. D. A. 1857, p. 234: and see *Shah Mukhun Lal's* case, 12 Moore, 157.

(g) 7 W. R. 30.

(h) 6 N. W. P. 260.

(i) 5 N. W. P. 294. See N. W. P. v. 9, p. 564: v. 11, p. 119.



sold his rights in the estate : and it was held that the purchaser was entitled to redeem, if he did so before March (j).

There being five joint mortgagors, the mortgagee came to an arrangement with three of them by which he consented to take a decree against those three for Rs. 14000. In taking an account subsequently of what the five were jointly liable for on the mortgage, the decree taken under that arrangement was treated as representing Rs. 14000 paid at that time. The mortgagee chose instead of taking the money to take a decree for the money,—and in the account with the other mortgagors the decree must be considered as a sum paid in reduction of the liability of the five (k).

A decree of Court declaring a mortgage finally foreclosed and the mortgagee entitled to possession, puts an end for ever to all the rights in the land, of the mortgagor and of any other person claiming under him who is bound by the decree and whose title did not originate prior to the date of the mortgage which has been foreclosed. Government may, however, at any time cause lands to be sold for arrears of revenue, into whose hands soever they have passed.

A foreclosure decree of the old Supreme Court in a mortgage suit (as to lands in the mofussil) is equivalent in effect to a decree in the mofussil Courts establishing proprietary right on a like instrument (l).

It is hardly necessary to observe, that care must be taken by the Courts to ascertain the real nature of the mortgage they are dealing with, and that if the remedies applicable to one species of mortgage are made use of when the transaction belongs to another, the whole proceedings may be bad. Thus, when possession was given by the lower Court, under the impression that the mortgage agreement was one of conditional sale, and the transaction was afterwards, on appeal, found to have been only a simple mortgage, the transfer of the land made by the Court below was cancel-

(j) 24 W. R. 429.

(k) 22 W. R. 310.

(l) *Nawab Sidhee Nazir Ali*

Khan v. Ojoodhyaram Khan, 10
Moore 322, 5 W. R. P. C. 83.



led, and the mortgagees were enjoined to accept a tender of principal and interest which was made by the mortgagor, notwithstanding that more than a year had elapsed from the issue of notice of foreclosure by the mortgagee as in a case of mortgage by conditional sale (*m*). So, the Court of appeal, considering the mortgage to be by conditional sale, reversed the decision of the District Judge and Munsiff, who had respectively held that the transaction was a simple mortgage and therefore not subject to the rules applicable to conditional sales (*n*).

In a suit for possession on foreclosure, a decree for money cannot be given (*o*). And a suit will not lie by a mortgagee to foreclose and to recover interest. "Had the mortgagor repaid the money lent, interest would have been payable under the section referred to (*p*); but by foreclosing the mortgage and obtaining possession of the property, the mortgagee must be considered to have secured all he was entitled to receive in the transaction" (*q*).

The mortgagee having obtained a decree for foreclosure and possession, is entitled to immediate possession of the property; and if he meets with any opposition or delay, he is entitled to recover all costs and expenses incurred by him in consequence, together with mesne profits or wasilat from the date of his decree. And for these costs and mesne profits, the mortgagor and all those who represent him, and are bound by the decree, are liable (*r*).

In one case, where the terms of the contract were that in the event of the mortgagor's making default in payment on a particular day, he would put the mortgagee in possession of certain lands by way of absolute sale, and the mortgagor made default in payment and also in surrendering his property as agreed,—the mortgagee was allowed to sue for the recovery of the principal sum lent, with interest, and was not restricted to his suit for possession (*s*).

(*m*) S. D. A. 1848, p. 194.

(*q*) S. D. A. 1856, p. 388.

(*n*) 8 N. W. P. 370.

(*r*) S. D. A. 1847, p. 479.

(*o*) S. D. A. 1851, p. 648. See
11 N. W. P. 75.

(*s*) 5 Sel. Rep. 10. See 5 B. L.
R. 389.

(*p*) Reg. I of 1798, sec. 2.



But ordinarily the mortgagee cannot sue for the recovery of the money lent by him, instead of for foreclosure and possession, except when good and sufficient cause is shown for his adopting such a course. And only something which, without any blame on his part, renders it impossible for the mortgagee to obtain possession, will be considered to be good and sufficient cause (*t*).

Thus the mortgagor having been all along in possession, and having neglected to pay the Government revenue, in consequence of which the land was, after the issue of notice of foreclosure, sold for arrears, the mortgagee was allowed to recover the principal and interest due to him, his lien having been destroyed through no fault of his (*u*). But, as the rights of a mortgagee are in no degree affected by any subsequent transfer of the mortgaged property except a sale for revenue, a private sale by the mortgagor, or even a sale in execution of a decree and after the issue of notice of foreclosure, will not entitle a mortgagee by conditional sale to sue to recover the debt. His remedy is still against the land alone (*v*). And so, where the mortgagee had obtained a decree for foreclosure and possession, but before he could get possession, the property was advertised and sold in satisfaction of the decree of another judgment creditor (*w*).

One who for good and sufficient reason sues for the money due, instead of for foreclosure and possession, must not sue merely as on a common money bond, but as for money which he has become entitled to claim in consequence of the mortgagor's breach of contract. His plaint, in short, must be consistent with the case he intends to prove (*x*).

It has been said that if a suit is brought for money when it ought to have been for possession, or *vice versa*,

(*t*) Cons. 898, 5th Sept. 1834. P. 209.

7 Sel. Rep. 92.

(*u*) 7 N. W. P. 272.

(*v*) S. D. A. 1848, p. 368.

(*x*) S. D. A. 1850, p. 44.

(*w*) 7 Sel. Rep. 42. 3 N. W.



the objection must be specially pleaded by the party who wishes to take advantage of it, and that the Court must not of its own accord take notice of the error (*y*). But if a plaintiff sues for that to which, according to his own showing, he is not legally entitled, it is difficult to see how the Court can do otherwise than reject his plaint, or dismiss his suit, whether the defendant takes the objection or not.

In one instance, a mortgagee sued for and recovered one half of the sum advanced by him. The mortgagor, on receiving the loan, had executed a deed engaging to make over certain property in mortgage by conditional sale; but he in fact made over only half of that property. The Court ordered that he should return to the mortgagee a proportional amount of the sum received by him, with interest (*z*).

When mortgaged lands are sold for arrears of Government revenue, which have not accrued through the default of the mortgagee, any proceeds which may arise from the sale, in excess of the arrears, are subject to the claim of the mortgagee (*a*).

And if the proceeds in excess of the arrears due in respect of the lands sold, are applied by the Collector in liquidation of arrears due from the mortgagor on *other* lands, the sum so applied may be recovered by the mortgagee (*b*).

The mortgagees of a two annas' share of a certain property instituted the ordinary proceedings to foreclose: but the mortgagor continued in possession after the expiry of the year of grace. Being so in possession the mortgagor neglected to pay certain Government revenue, and some of her co-sharers paid it. Subsequently the mortgagee sued the mortgagor for possession (on foreclosure), got a decree and obtained possession under it. It was held that the co-sharers were entitled to recover from the

(*y*) 8 N. W. P. 272, 591.

p. 527: 1859, p. 622. See *ante*, pp. 112, 113.

(*z*) S. D. A. 1851, p. 750.

(*a*) S. D. A. 1854, p. 182: 1855,

(*b*) S. D. A. 1854, p. 182.

p. 411: and see 1853, p. 87: 1857,



mortgagee the amount which they had paid (on the mortgagor's default) for Government revenue. When the default occurred, the mortgagees had in fact completed their legal title to the two annas' share, and were entitled to possession : and they might, if they had pleased, have paid the revenue which the mortgagor failed to pay (c).

A mortgagee who forecloses and subsequently gets possession, is not liable for back rents which accrued due prior to his obtaining possession,—unless he has expressly agreed that he shall be so liable (d). And a mortgagee who has foreclosed may, if he pleases, sell his right title and interest in the mortgaged land, and the purchaser will be entitled to possession just as the mortgagee himself was entitled (e).

A plaintiff sued to have his name registered in the Collectorate as proprietor of certain lands, alleging that he was in possession, the property having first been leased to him and then (before the lease expired) mortgaged to him, and the mortgage having been foreclosed. The judge nonsuited the case because the plaintiff "had not obtained possession of the foreclosure in virtue of his mortgage," and because "he was bound to sue for possession under the mortgage before he could prefer a claim for mutation of names." The Sudder Court decided that "as the plaintiff was in possession, and his suit for the mutation of names brought into issue every point that could have required investigation in a suit for possession under the mortgage," the judge should have tried the case on the merits. And it was accordingly remanded to him for re-trial (f).

In a suit for foreclosure, a third party intervened and proved an absolute sale to himself prior to the date of the mortgage. The mortgagee's foreclosure suit was consequently dismissed, and he was ordered to pay the costs of the intervening proprietor. On appeal, this order was

(c) 21 W. R. 255.

(e) S. D. A. 1860, v. 2, p. 53.

(d) S. D. A. 1856, p. 1019.

(f) S. D. A. 1856, p. 8.

confirmed, as it was the mortgagee's suit which compelled the third party to come into Court; the mortgagee, however, was entitled to recover from the mortgagor all the costs incurred by him in the case, including those of the intervener (g).

If a mortgagee alienates the mortgaged property while a suit instituted by him for foreclosure is pending, the alienation will not be allowed to stand between the mortgagor and those rights to redeem which that suit may have left open or affirmed to him (h).

One who has the right of pre-emption may assert it when the conditional sale comes to be made absolute. The right of pre-emption does not arise on the making or entering into the contract of conditional sale or mortgage, nor until the mortgagor's right of property has been completely extinguished. But as soon as the year of grace expires—no steps having been taken to redeem—a suit for pre-emption may be maintained (i).

A suit to enforce the right of pre-emption must be commenced within one year from the time when the purchaser (the mortgagee) takes actual possession under the sale sought to be impeached (j). And the Allahabad Court has held that the purchaser of the equity of redemption of immoveable property which is at the time of sale in the usufructuary possession of the mortgagee, "takes actual possession" within the meaning of that term in Art. 10, Sch. 2, of the Limitation Act, when the equity of redemption is completely transferred to and vested in him (k).

(g) S. D. A. 1853, p. 574.

(h) 8 W. R. 399.

(i) 2 W. R. 215 (F. B.), 6 B. L. R. ap. 114. See *ante*, p. 52.

(j) Act IX of 1871, Sch. 2, art. 10.

(k) Stuart, C. J. *dissent.*, 1 I. L. R. All. 311 (F. B.).



CHAPTER X.

OF ACCOUNTING.

IN every case not coming under Act XXVIII of 1855, in which it is not admitted by the mortgagor that the sum alleged by the mortgagee to be due to him is, or at the expiry of one year from the date of the service of notice of foreclosure was, really so due, the Court must take an account of the principal, interest and costs due on the mortgage—whether the suit be brought by the mortgagor for redemption, or by the mortgagee for foreclosure. But the precise nature of the account depends upon the circumstances of each case, and the issues raised in it.

By Reg. XV of 1793,—the general effect of which was to allow no more than twelve per cent. annually on any mortgage or other contract entered into after the 28th of March 1780,—it was enacted (a) that for the adjustment of accounts in cases of mortgage later than that date, in which the mortgagee had the usufruct of the property, the mortgagee should be required to *deliver in* the accounts of his gross receipts from the property mortgaged, and also of his expenditure for the management or preservation of it. And Reg. I of 1798 enacted that in all instances wherein a lender on a bye-bil-wufa or similar conditional sale may have been put in possession of the land, and an adjustment of accounts may consequently become necessary between him and the borrower, the lender is to account to the borrower for the proceeds of the estate whilst in his possession, on the principles prescribed with regard to mort-

(a) Secs. 10 and 11,—repealed actions falling under that Act.
by Act XXVIII of 1855, as to trans-

gages and interest in Reg. XV of 1793, so far as the same may be applicable to the nature of the case.

Thus the necessity for a mortgagee by conditional sale who has been in possession to produce his accounts arises when an adjustment of accounts becomes necessary between him and the mortgagor,—that is to say, it arises, “*firstly*, when the mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of the account: *secondly*, when he has deposited all that he admits or alleges to be due: and *thirdly*, when he pleads and undertakes to prove that the whole of the principal and interest have been liquidated by the usufruct of the property” (*b*).

The mortgagor who alleges that the mortgage debt has been satisfied from the usufruct, must prove his case, like any other litigant. But he is entitled to demand that the mortgagee's accounts shall be filed before he, the mortgagor, is called upon actually to prove that the debt has been satisfied (*c*).

When the Court dismisses a redemption suit on the ground of the mortgage debt not having, up to the date of suit, been liquidated from the usufruct, it should determine the exact sum then outstanding, by making up a correct account and disposing of the objections of the parties in regard to the items composing it, in order that no matter admitting of adjudication in that action may be left open to future litigation (*d*).

The mortgagor, if allowed to remain in possession, is not bound to account for the rents and profits received by him from the land; and there seems to be no exception to this

(*b*) *Forbes v. Amceroonissa*, 10 Moore 340, 5 W. R. P. C. 47 (52). See 6 W. R. 84: and *ante*, p. 173 *et seq.*

(*c*) *Shah Mukhun Lal's case*, 12 Moore 157 [192], 2 B. L. R. P. C. 44. S. D. A. 1855, p. 432. 9 N. W.

P. 371.

(*d*) N. W. P. v. 8, p. 112: v. 9, p. 388. And see 24 W. R. 275, and *ante*, pp. 165, 166, 178,—but, as there indicated, the practice cannot be deemed quite settled.



rule, however insufficient the security may be. But if, in breach of an express agreement to the contrary, he remain in possession, to the exclusion of the mortgagee, the latter will have his remedy in a suit for possession and mesne profits.

The mortgagee is subject to an account from the time he is put in possession, and for the whole period that he remains in possession in the character of mortgagee (*e*). But he will not be so subject if the mortgage was made after Act XXVIII of 1855 came into force, and there is an express stipulation that he shall not be called on to account. If the mortgagee has, during a part of his term, held under some title other than that as mortgagee, he will not have to answer to the mortgagor for the proceeds accrued during that period. In one case, it happened that neither the mortgagee in possession, nor the mortgagor, chose to pay up certain old balances of revenue which had become due before the making of the mortgage. The Collector having entered on the estate, the mortgagee afterwards came forward and paid the arrears, whereupon the Collector gave him a farm of the land for ten years. These ten years were held to constitute a gap in the possession under the mortgage, and the mortgagee was not compelled to render an account of the profits then received by him (*f*).

Where the mortgage deed declared that the mortgage was to have effect from a date prior to that of the deed, it was held that the mortgagee who had been in possession was liable to account for the proceeds from such prior date, but that the mortgagor must be charged with interest from the same date (*g*).

In taking the accounts, interest is, as a general rule, allowed on the payments of both parties. There are two modes in either of which the accounts may be made up. They may be permitted to run on, from the date of the

(*e*) Reg. I. 1798, sec. 3. S. D. 1850, pp. 127, 490.
A. 1857, pp. 96, 234: 1858, pp. (*f*) 7 N. W. P. 7.
727, 757, 1235, 1525, 1961: (*g*) 10 N. W. P. 684.



loan to the date of settlement, interest being allowed to the one party on the whole sum lent, and to the other on the sums realised over and above the interest to which the mortgagee is entitled, from the date of realisation :—or the amount collected by the mortgagee in possession may be carried first to interest, and after paying that, to the liquidation of the principal, the account being closed at the end of each year and there being allowed from year to year only reduced interest on the reduced principal (*h*). The result attained by these methods is the same.

According to Hindu law a sum larger than the amount of the principal debt could not be recovered on account of arrears of interest at any one time. But if the principal remained outstanding, and the interest were paid in sums smaller than the amount of the principal, there was no limit to the amount of interest which might be thus received from time to time (*i*).

Then came the Regulations, the practical result of which was that no more than twelve per cent. could ever be recovered. And Reg. XV of 1793, Sec. 6 enacted that if interest on any debt, calculated according to the rates allowed by that Regulation, accumulated so as to exceed the principal, the Courts were not to decree a greater sum for interest than the amount of such principal (*j*). This rule, it is to be observed, applied only to interest allowed to accumulate : and it did not apply to interest which accrued due after the institution of the suit, nor restrict the lender or mortgagee to the receipt *in the whole* only of interest equal to the amount of the principal lent (*k*). By Act XXVIII of

(h) See *Radhabenode Misser v. Kripamoyee Debea*, 14 Moore 443, 10 B. L. R. 386. S. D. A. 1848, p. 549 : 1852, p. 831 : 1859, pp. 497, 1211, 1543. 5 W. R. 200. 1 Agra, 132.

(i) See *Shah Mukhun Lal's case*, 12 Moore 157 [187]. 1 Bom. a. j. 47 : 5 Bom. a. j. 196. See 5 Bom. a. j. 157.

(j) To the same effect is Reg. XXXIV of 1803, sec. 5 :—and both these enactments are repealed by Act XXVIII of 1855. See 8 N. W. P. 479.

(k) Sel. Rep. v. 1, p. 242 : v. 3, p. 270 : v. 4, p. 261. S. D. A. 1859, p. 1543. 2 W. R. 289. See 6 Mad. 400.



1855, Section 6 of Reg. XV of 1793 was repealed as also were "all laws relating to usury" in force in any part of the British territories,—and it was enacted, in substance, that in all contracts falling under Act XXVIII of 1855 interest at the rate stipulated should be allowed between the parties. An opinion has been expressed (*l*) that Act XXVIII of 1855 did not repeal the Hindu or Mahomedan law as to interest. But this can scarcely be accepted as the generally received opinion on this side of India,—and it has been expressly dissented from in a subsequent case (*m*). Still more recently it has been held that the old rule of the Hindu law no longer prevails in the mofussil, and that the Courts there can award interest according to the contract between the parties (*n*). It has, however, been held in Bombay that the old Hindu law remains in force, and is not affected by Act XXVIII of 1855 (*o*).

The ordinary rules regarding the allowance of interest will be followed even when the parties are both Mahomedans, whose law forbids the taking of interest. The custom of taking interest by Mahomedans, is recognised by the Courts (*p*): and a question as to interest, arising in a mortgage suit, is not a question of succession, inheritance, marriage, or caste, or any religious usage or institution, such as the law requires should be regulated by the peculiar law of the litigant (*q*).

When on the accounts being adjusted, it is found that the mortgagee's claim for principal and interest has been completely satisfied, all subsequent receipts are to be considered to belong to the mortgagor, and he will be entitled to simple interest on them until they are repaid to him (*r*). But although the general practice of the Courts is to allow

(*l*) By Peacock, C. J. in 3 B. L. R. o. j. 130 (184).

(*m*) By Phear, J. in 5 B. L. R. 500 (503).

(*n*) 1 I. L. R. 92, 24 W. R. 106.

(*o*) 3 Bom. a. j. 23 : 9 Bom. 83.
See 1 I. L. R. Bom. 73.

(*p*) 5 B. L. R. 500.

(*q*) 1 I. L. R. 92, 24 W. R. 106.
Act VI of 1871, sec. 24. S. D. A. 1848, p. 530. 7 N. W. P. 88.

(*r*) S. D. A. 1853, p. 464. See 10 N. W. P. 257.



interest on mesne profits or wasilat, still it will not be given if there has been any improper delay in the institution of the suit for their recovery, or if any special ground exists for withholding it. There is no rule rendering it compulsory on the Courts to decree a specific rate of interest; a discretionary power is vested in them, in reference to the circumstances of each case (s). And mere delay is not necessarily *improper* delay (t).

Any agreement made by the parties as to the manner of accounting will be enforced, if not in itself illegal. Thus, if they have agreed that the residue of the sums received from the land, after payment of interest, shall be carried to liquidation of the principal and the account closed to the end of each year, the accounts must be taken in this manner (u).

In cases to which the usury laws are applicable, and where there is no agreement that a less rate shall be taken, the Courts may allow interest at the rate of twelve per cent. per annum. But they are not bound to award twelve per cent.; that is the highest rate which they can give, and though it may be the general understanding of the country that twelve per cent. should be awarded on deeds containing no stipulation for a lower rate, still this general custom may be departed from (v). In cases to which the usury laws are not applicable, the Courts will allow interest at the rate stipulated for in the contract: or if no rate of interest shall have been stipulated for, and interest be payable under the terms of the contract, at such rate as is deemed reasonable (w).

Any stipulation by which the mortgagee agrees to take

- (s) N. W. P. v. 8, p. 228 : v. 10, v. 10, p. 22.
p. 8. (v) 24 W. R. 275. S. D. A.
(t) 9 N. W. P. 368. See S. D. 1852, p. 748. N. W. P. v. 8, p.
A. 1855, p. 404. 228 : v. 9, p. 368 : v. 10, pp. pp.
(u) *Radhabenodo Misner's case*, 14 22, 684. See S. D. A. 1854, p.
Moore 443 (451), 10 B. L. R. 392. 518.
S. D. A. 1848, p. 549. 10 N. W. P. (w) Act XXVIII. of 1855, Sec. 6.



interest at a rate lower than twelve per cent. will be binding on him. And where he has consented to take the usufruct of the land in lieu of interest, he cannot claim interest at the legal rate or otherwise, on the ground of the usufruct having fallen short of the legal or any other rate (*x*). In usufructuary mortgages the law requires an account of the proceeds in order to prevent the mortgagee receiving more than his principal with interest at twelve per cent. If the proceeds do not give what is equivalent to interest at that rate, and no other rate is stipulated for, "the presumption is that the usufruct was deemed by the mortgagee sufficient interest for the money debt, and the mortgagor is not bound to pay a further sum, to make up any particular rate" (*y*).

In the case of a non-usufructuary mortgage, interest not being expressly stipulated for, the mortgagee was held to be entitled to interest only from the date upon which the loan became re-payable (*z*). And in another case, interest was allowed only from the date of suit, until realisation of the principal sum decreed (*a*).

Interest above the rate of twelve per cent. per annum is not to be allowed in the case of contracts entered into before Act XXVIII of 1855 came into force. And compound interest, arising from intermediate adjustments of accounts, is not to be given in such cases. But this rule does not apply where accounts between the parties have been adjusted, and the former bonds or agreements have been cancelled and new bonds or agreements taken for the aggregate amount of principal and interest consolidated into principal (*b*).

In one case the accounts were prepared on the principle

(*x*) N. D. P. v. 7, p. 307; v. 8, p. 178. S. D. A. 1852, p. 678.

(*y*) S. D. A. 1860, v. 2, p. 223. See 3 N. W. P. 417.

(*z*) S. D. A. 1855, p. 54.

(*a*) 10 N. W. P. 303.

(*b*) Reg. XV. 1793, secs. 4, 7, 8; Reg. XXXIV. 1803, secs. 3, 6; Reg. XVII. 1806, sec. 2, (all repealed by Act XXVIII of 1855). S. D. A. 1852, p. 1021. 11 N. W. P. 175.



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of striking a balance of interest at the close of the year, deducting the principal of all payments by the debtor, from the principal of the debt, and setting off only the interest accruing to the debtor on his payments during the year, against the interest becoming due on the principal debt. The Court held that this was wrong, and that the debtor was entitled to have all sums credited to him during the year, applied first to the liquidation of interest, and the surplus only, remaining after such liquidation of interest, carried to the reduction of the principal (c).

Under Act XXVIII of 1855, a contract by which it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, is binding upon the parties : and interest is to be calculated at the rate stipulated in the contract, or if no rate of interest has been stipulated for, and interest be payable under the terms of the contract, at such rate as the Court shall deem reasonable (d).

The mortgagee is required to deliver accounts of his gross receipts and of his expenditure, and it is a positive duty that he should do so (e). Moreover, the accounts rendered must be full and complete, and the judge must not rest contented with a mere rough abstract of the receipts during the time the mortgagee has been in possession (f).

Speaking of the duty (under Reg. XV of 1793) of the mortgagee in possession to keep accounts, the Privy Council said in *Shah Mukhun Lall's* case, the duty of the mortgagees " was to keep an account of the gross receipts from the property mortgaged and also the expenses of management and preservation. Some difficulties might attend a very rigid compliance with the Regulation. Their Lordships desire to enforce by every thing which may fall from them on the subject, the duty, as well as the policy and prudence of keeping as full, complete and plain an

(c) S. D. A. 1858, p. 404.

(d) Act XXVIII. 1855, secs. 4, 6.

(e) 7 N. W. P. 68, 511. S. D. A. 1856, pp. 328, 522 : 1857, p.

1513. Reg. XV. 1793, sec. 11 :

Reg. XXXIV. 1803, sec. 10.

(f) 5 N. W. P. 244.



account of the transactions attending the management and receipts of an estate mortgaged as the nature of the case will admit. It is obvious, however, that the language of the section which applies to the common case must receive a construction such as may suffice to accommodate its strict salutary provisions to the variable and different natures of estates and possession. The gross receipts must be such as the mortgagor himself, previous to the mortgage, would have been entitled to ; and if he could not by reason of an intervening lease call for the account of the collections, neither can his mortgagee. Also, if at the time of the mortgage a valid engagement, not designed to exclude accounting, is made by common consent qualifying the nature of the usufructuary possession, the account of the receipts must be subject to that modification. The terms of the law are evidently not inflexible terms. And in like manner must be construed the provision as to the truth of the accounts, which provision must necessarily be flexible, like the former. For the mortgagee is to verify only his gross receipts and his expenditure, *not* the rents, nor the extent of arrears, nor the causes of the arrears. He is not in fact directed *then* to make out and verify such an account as might be established against him in a hostile suit, —but only his gross receipts and his expenditure" (g).

In accounting, the mortgagee must give an account of the *bonā fide* proceeds of the estate while in his possession. *Jumma-wasil-bakee* papers, and other such like papers are not *per se* a sufficient account within the meaning of Reg. I. 1798, sec. 3,—but these papers may be used in corroboration of a properly framed account. In one case the Court said, the *jumma-wasil-bakee* papers "are not, and cannot be, the account itself. The account which the mortgagee has by law to put into Court, is not that of his agent or *tehsildar*, given by the latter for his master's (the mortgagee's) information as to such agent's collections. The *jumma-wasil-bakee* paper however, is this latter only.

(g) 12 Moore 157 (195), 2 B. L. R. P. C. 55. See 24 W. R. 275.



The accounts to be put in under the law, are to be made, verified and proved by the mortgagee himself." The Court after saying that *jumma-wasil-bakee* papers and the like might well be adduced to support the mortgagee's own account when duly made and filed, continued :—"The account required from the mortgagee is one setting forth what he has realised,—from what portions of the mortgaged property,—in what terms or periods,—with what loss and gain on the several assets,—with what necessary reductions,—and what remains then as the net profits which can be taken as actual realisations toward liquidating the sum due under the mortgage" (h).

The mortgage being of a fractional share of a joint estate managed by common servants of all the sharers, the mortgagee put in an account shewing what he had actually received from first to last, and swore to the correctness of it. The general accounts of the estate were called for, and produced by one of the joint proprietors, in whose hands they were. It was held that these accounts would ordinarily be in themselves sufficient, but that, in the particular case, further inquiry was necessary. And the Court declared it to be the duty of a mortgagee of a fractional share of an estate held in joint tenancy to see that he received out of the estate all that the mortgagor ought to have received, and to see not only that the assets are realised but that the expenses are carefully regulated (i).

The mortgagee must swear, or if he is a person exempted from taking oaths, must subscribe a solemn declaration, that the accounts delivered are true and correct (j). But the Regulation must be construed reasonably, as necessarily admitting of some delegation in the person deputed to prepare and attest the accounts. And it is enough if they are prepared and attested by the mortgagee's general manager who has been in charge of the matter and is better acquainted with all details than is the mortgagee him-

(h) 5 W. R. 271. See 5 W. R. 53, and 9 W. R. 572.

(i) 2 W. R. 150.

(j) Reg. XV. 1793, sec. 11; Reg. XXXIV. 1803, sec. 10. See Act VI of 1872, "The Oaths Act."



self (*h*). Native ladies whose attendance in Courts of justice is usually dispensed with, are not obliged to appear in Court to swear to the truth of the accounts prepared by their agents. The oath of the agent is all that is required (*l*).

When there are several joint mortgagees, the oath of one or more of them, competent to discharge the duty, is sufficient in regard to the *prima facie* admission of the accounts. How far such accounts are deserving of credit, is another question (*m*).

In a case in which the oath of the gomastah of the mortgagee was by consent taken in the lower Court as sufficient, the Sudder Court refused to listen to the objection that the mortgagee himself ought to have sworn (*n*).

It has been said that when a mortgagee, who has ceased to be in possession, sues to recover a balance from the mortgagor, he is not bound to swear to the accounts. These may possibly be no longer in his possession (*o*).

A mortgagee who evades the rendering of the required accounts, or who improperly refuses to depose to the truth of those rendered, is guilty of misconduct which may be taken into consideration on the question of costs (*p*). And in such a case, any reasonable proof, even if offered by the mortgagor (*q*), may be accepted by the Court. In one instance, a mortgagee in possession had applied to the Collector to have a renewal of the settlement of the estate made in his name, and sent in *dowl* papers along with his application, praying to be admitted to engage for the estate at the jumma therein specified. These papers when produced afterwards by the mortgagor, were held to be sufficient

(*k*) *Shah Mukhum Lall's case*, 12 Moore, 157 (198).

(*l*) 9 N. W. P. 465.

(*m*) N. W. P. v. 9, p. 465; v. 10, p. 318.

(*n*) 10 N. W. P. 318.

(*o*) *Ibid.*

(*p*) 7 N. W. P. 68. 18 W. R. 65.

(*q*) But see *Shah Mukhum Lall's case*, 12 Moore 157 (195, 198). S. D. A. 1858, pp. 727, 1235; 1859, pp. 270, 812. 6 W. R. 127.

evidence, as against the mortgagee who had failed to furnish any proper account (*r*). So an account prepared by an Ameen on the spot, from local inquiry, has been held to be a good basis on which to proceed, and to be sufficient as against the mortgagee who withheld his accounts (*s*).

It is a very common practice, when there are disputes as to the items of the account, for an Ameen to make out a statement of the collections, from investigation made by him on the ground; and when this is done, the collections are to be assumed as estimated by him, unless objections are at once taken to his report. And it is not proper to put aside the Ameen's report to which no objection has been taken by the parties, and to accept the rent-roll as the basis of the accounts. Nor is the rent-roll admissible as conclusive evidence, when the party in possession has filed his papers showing the amount collected (*t*).

The account will be taken on the footing of village papers regularly filed by the mortgagee and not objected to at the time by the mortgagor, unless very good reason is shown for putting these accounts aside and proceeding on other and independent data (*u*). If the mortgagee has not kept accounts, or has kept them badly, the presumption in every thing will be against him (*v*). But if the mortgagee does not file proper accounts, it does not follow that those of the mortgagor are necessarily to be taken as correct without any inquiry (*w*): and presumptions, even *in odium spoliatoris* have known reasonable limits, and must not be conjectures nor grounded on data which are evidently incorrect (*x*).

The mortgagee having rendered and sworn to the truth of his accounts, the Court will permit the mortgagor to

(*r*) 7 N. W. P. 511.

(*s*) S. D. A. 1848, p. 346: and see 1856, p. 328: 1857, p. 1513: 1862, pp. 51, 57.

(*t*) S. D. A. 1852, p. 831: and see 1860, v. 1, p. 239.

(*u*) 10 N. W. P. 684.

(*v*) 10 N. W. P. 684, 378. 6

W. R. 127. See 8 W. R. 203: 9 W. R. 275.

(*w*) 9 N. W. P. 352. S. D. A. 1858, p. 756.

(*x*) *Shah Mukhun Lall's case*, 12 Moore, 157 (198).



examine them, and after hearing his objections, will proceed to take evidence on both sides. But the objections of the mortgagor must be specific and distinct as to each item intended to be disputed: and a mere general charge of falseness and inaccuracy will not be attended to (*y*).

A judge is not bound to adopt the accounts which he believes to be false, either of one party or of the other: but, rejecting the detailed accounts furnished, he may on some equitable principle fix a sum, according to his best judgment, as the amount of the annual produce. And in one case, where the judge, doubting the accounts of both parties, valued the lands at the sum assessed on them by the Collector during a period of temporary resumption, the Court considered this an equitable mode of calculation, and confirmed it (*z*).

But the valuation put upon the lands by the judge must be founded on some distinct tangible ground, and not on mere conjecture or guess. Thus when the lower Court disallowed the rent entered against certain lands in the yearly rent-roll filed in the Revenue office, and assumed in its place a conjectural rate obtained from an average of the several rent rates leviable from the other lands in each of the mouzahs which were the subject of the suit, it was held that the average struck in such a manner must be purely arbitrary, and that the enhanced rate fixed on such uncertain grounds, and unsupported by evidence, could not be maintained (*a*).

The *nikasee* accounts annually given in by the putwarree, furnish a valuable test of the accuracy of the accounts and papers filed by the parties, and a judge may with great propriety refer to them (*b*). But though they are useful as a test, they are not indispensably necessary, when the

(*y*) Reg. XV. 1793, sec. 11: Reg. XXXIV. 1803, sec. 10. N. W. P. v. 6, p. 32: v. 7, p. 607: v. 8, p. 107.

(*z*) 4 N. W. P. 317.

(*a*) 8 N. W. P. 107. And see the cases referred to in p. 248, notes (*v*) (*w*) and (*x*).

(*b*) N. W. P. v. 5, p. 244: v. 6, p. 32.

details furnished by the mortgagee fully enable the Court to proceed to an adjustment without them. And although the judge may refer to them of his own accord, in order to check accounts given in by the parties, a decree of which they are the sole foundation is bad, unless they have been regularly filed in the suit; the judge must not of his own accord send for them to the Revenue office, and from them alone make out an account (c).

The mortgagee (who had been in possession under an usufructuary mortgage of date prior to Act XXVIII of 1855) did not produce any proper account of his gross collections and expenditure. The mortgagor, who was suing to redeem, examined putwarrees and gomastahs employed by the mortgagee to collect the rents, and a large number of tenants, to prove the collections in each year: and the putwarrees produced the jumabundee papers and proved them. The mortgagee gave no counter evidence. The Court accepted the jumabundee papers as genuine, supported as they were by a large body of oral evidence, and directed that the accounts between the parties should be adjusted upon the basis of these jumabundee papers (d).

If the mortgagee makes an admission in his pleadings as to the amount of his receipts from the land, believing it at the time to be for his own benefit, he will not afterwards be allowed to contradict or to explain away the statements he has so made (e).

As a general rule, the Court will give the mortgagor credit for every sum entered in the accounts rendered by the mortgagee as realised, and will not allow the latter to repudiate any such sum on the ground of its being an illegal cess, or payment which could not have been enforced. On the other hand, such illegal payments when not admitted by the mortgagee, cannot be allowed; and the mortgagor will not be permitted to go into proof of

(c) 7 N. W. P. 68.

(d) 24 W. R. 275.

(e) N. W. P. v. 8, p. 226: v. 9, p. 371.

them (*f*). But although the mortgagor will not be credited with sums derived from *haut* or market tolls, he is nevertheless entitled to credit for the rent of the land on which the *haut* or market was held (*g*).

The gross receipts referred to in the Regulations are the gross sums paid by the tenantry of the estate mortgaged, not merely what actually reaches the mortgagee's hand. And if he creates a middle-man between himself and the tenants this does not exonerate him from the liability to account for the gross receipts (*h*). He must answer for the rents appearing in the *jummabundee*, and not merely for his actual collections: but he will of course only be liable for the amount realised, if he can show good reason for not having realised the whole rent-roll exhibited in the *jummabundee* (*i*). If the land is held by under-lessees by virtue of leases granted prior to the mortgage being made, so that the mortgagee has not in fact had the full usufruct of it, the mortgagor is to be credited only with the net profits received by the mortgagee (*j*). So if the estate, though nominally in the hands of the mortgagee, is actually managed by the mortgagor (*k*).

If the mortgagee has actually cultivated the land himself, he must account for the fair rent of the land. But he need not account for the extra profit made by him by reason of having himself cultivated. He need account only for such profits as the mortgagor would have realised had he let out the property (*l*).

It has been already seen, that the mortgagee is respons-

(*f*) N. W. P. v. 7, p. 248 : v. 8, p. 178. Rep. Sum. Cases, 10th Feb. 1846.

(*g*) Rep. Sum. Cases, 10th Feb. 1846.

(*h*) S. D. A. 1852, p. 1137. See S. D. A. 1857, p. 1513. See *Shah Mukhun Lal's* case, 12 Moore, 157 (195), and *ante*, pp. 244, 245.

(*i*) N. W. P. v. 8, p. 564 : v. 9, pp. 159, 201, 465 : v. 10, pp. 51, 355. S. D. A. 1858, p. 1847 : 1860, v. 1, p. 639. See 2 W. R. 150.

(*j*) *Shah Mukhun Lal's* case, *ubi supra*. 8 N. W. P. 107, 112, 564.

(*k*) 10 N. W. P. 115.

(*l*) 7 W. R. 244.



ible for gross mismanagement, or for waste committed by him (*m*). If he chooses improperly to record lands as rent-free, which are not so, he will be charged with the full rent which they would have brought in (*n*). And a clause in a mortgage deed to the effect that an allowance shall be made to the mortgagee "for losses," has been held to apply only to losses beyond his control, and not to arrears which he has wilfully or by negligence allowed to remain outstanding (*o*).

All expenses fairly incurred in respect of the property will be credited to the mortgagor. He will be allowed a charge for the wages of chowkeydars and putwarrees, which form regular items in village expenses altogether independent of the will of the mortgagee (*p*). But those payments only will be allowed which have been *bond fide* made: and therefore where the possession of *jagheer*, or service land, by the chowkeydars of each mouzah, was shown by the entries of rent-free lands under their names in the yearly jumabundeas, a charge for chowkeydars was struck out of the mortgagee's account (*q*).

The reasonable costs of collection and management will also be allowed; and the percentage for collection is charged on the gross rental, and is usually considered to cover ordinary balances (*r*).

When a house is mortgaged, the mortgagee is entitled to charge the mortgagor with reasonable and necessary repairs (*s*).

A mortgagee is to be allowed all payments in respect of Government revenue, made by him while in possession; and this, whether the revenue fell due after the making of the mortgage or before it, the mortgagee being entitled to

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| (<i>m</i>) <i>Supra</i> , pp. 118, 119. | ed, N. W. P. v. 9, pp. 201, 371: |
| (<i>n</i>) 9 N. W. P. 525. | v. 10, pp. 355, 378. |
| (<i>o</i>) 9 N. W. P. 159. | (<i>r</i>) N. W. P. v. 7, p. 477: v. |
| (<i>p</i>) N. W. P. v. 7, pp. 248, | 8, pp. 112, 264: v. 9, p. 371: v. |
| 477: v. 8, pp. 107, 564. | 10, p. 51. 1 Agra, 132. 9 W. R. |
| (<i>q</i>) 8 N. W. P. 107. And see | p. 575. |
| generally as to what will be allow- | (<i>s</i>) 9 W. R. 488. 2 Agra, 187. |



do any thing which it is the duty of the mortgagor to do in order to preserve the estate (*t*). But if it has been expressly agreed that these charges shall be borne by the mortgagee, he will, of course, not receive credit for them in passing his accounts (*u*). Nor, on the other hand, will he be debited with any thing for which it has been specially agreed he shall not be liable (*v*).

A mortgagee who, being in possession, lets the estate fall into arrears, in consequence of which the Collector enters on the land for a time, must account for the full profits of the whole of that period, just as if he had never been disturbed in his possession,—it being his duty, in the absence of an express stipulation to the contrary, to pay the Government revenue before disbursing any other sum (*w*). And this is so, even when the balance did not originally accrue from his own personal default, but arose from the default of the owners of other lands, which together with those mortgaged formed a single undivided mehal, every portion of which was responsible for the revenue due in respect of the whole. The possibility of the proprietor of one mouzah being called upon to make good arrears unpaid by the proprietor of the other, necessarily arose out of the nature of the tenure, and was one for which the mortgagee was as much bound to provide, as for the revenue payable in respect of the mouzah which was pledged to him (*x*).

But the mortgagee will not be liable if the default, though nominally made by him, is in reality that of the mortgagor (*y*).

If the nature of the mortgage agreement is such that there is an annual payment to be made to the mortgagor,

(*t*) S. D. A. 1848, p. 346 : 1852, p. 1063, 7 N. W. P. 7. 3 W. R. 6, 174. See, however, 3 W. R. 162.

(*u*) 8 N. W. P. 225.

(*v*) N. W. P. v. 7, p. 477 : v. 9, p. 159.

(*w*) 3 N. W. P. 471. See N. W. P. v. 7, p. 7 : v. 9, p. 465 : v. 10, p. 553.

(*x*) 9 N. W. P. 164. See S. D. A. 1855, pp. 31, 44.

(*y*) 11 N. W. P. 115.

and these payments are allowed to fall into arrear, the law of limitation will have effect: and the mortgagor cannot, when the accounts are taken in a case to which the old law of limitation is applicable, be allowed credit for sums which became due more than twelve years previous to the institution of the suit. Therefore when the contract was that the mortgagee should pay an annual rent of forty rupees to the mortgagor, but no payment was in fact made for many years, the mortgagor was credited with rent for twelve years only, his claim for the rest that was due being barred (z).

(z) S. D. A. 1850, p. 205.



CHAPTER XI.

OF MOFUSSIL MORTGAGES IN THE HIGH
COURT AS A COURT OF ORIGINAL
JURISDICTION.

HAVING sketched the law which governs mortgages in the Mofussil Courts (and consequently in the High Court also as a Court of appeal from them,) it remains to add a few words on the law as administered in the High Court as a Court of ordinary original civil jurisdiction. In the exercise of that jurisdiction, the High Court stands in most respects in the place of the late Supreme Court. The law which it applies to mortgages may be said generally to be the English law,—and this, without reference to the nature of the mortgage, whether it is in the form of an English mortgage, or in one of the forms in common use in the mofussil. But it is only speaking *generally* that the English law can be said to be applicable.

In the Supreme Court it was held that when the evidence showed that the contract was made *with special reference to the mofussil law*, the Court must decide the case according to that law, although it would not be bound to follow the mofussil Courts as to matters of *mere procedure*. In delivering judgment in the case of *Skinner v. Sandyal* (a) the Chief Justice (b) said: "A preliminary question arises, viz., by what law should the cause be decided? It is a case of contract, and the defendants are Hindus, and by the terms of the statute the contract should be governed by

(a) Supreme Court 4th August, 1855. See *Doe d. Sibchunter Doss v.*

Sibkissen Bonnerjee, 1 Boulnois, 70.
(b) Sir Lawrence Peel.



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their law. But in truth the law of mortgages in the mofussil now depends on the Regulations, and not simply on the Mahomedan or Hindu law, and that statute consequently furnishes no rule. Had the evidence shown that these contracting parties had contracted with reference to a different law than the law of the *forum*, then, as we conceive that it would be perfectly competent for them to do so, the Court must have decided the case by the law of their adoption. There is certainly considerable difference between the law of mortgages as administered in the Company's Courts and the law of mortgages as applied in this Court. Still the fundamental principle under both systems, is that the mortgage security is to be a security for principal, interest, and costs only; and in whatever form it be taken, so far as it is a mortgage security, it will not be allowed to have any other effect. The law as to land tenure in India, and the effects of the revenue system there on the rights of proprietors or of persons interested in land, are very different from the law of real property in England, and the effects of any fiscal laws upon land; and may well justify the adoption of securities differing from those which are commonly adopted under the English law. And when the forms of securities which are adopted in mofussil mortgages, and the estates which are created there to give effect to such securities, obtain in contracts between British subjects, or between British subjects and natives, the adoption of them may be evidence that the parties meant, so far at least, to contract on the basis of the local law. The English law has nothing opposed to such an adoption and incorporation into itself, of a local law not forming part of it."

In a case in which a second mortgagee sought to redeem the first mortgagee, all the parties being Hindus, it was unsuccessfully contended that the mofussil law governed the case, and that according to that law as it had then recently been laid down, the first mortgagee having a mortgage in the nature of a conditional sale, could not be re-



deemed against his will by a second mortgagee (*c*). The lands were situated in the mofussil, and the plaintiff, the second mortgagee, held a simple mortgage. The defendants were first mortgagees under a deed in the English form : and they had obtained a decree for foreclosure in the Supreme Court, but had not made the plaintiff, as second mortgagee, a party in their suit. The defendants having been put in possession of the property under their foreclosure decree, the plaintiff instituted a suit to redeem in the Supreme Court. Neither that suit nor the earlier foreclosure suit would lie now in the High Court, no part of the lands mortgaged being situate within the local limits of the original jurisdiction (*d*). But under the law applicable to the Supreme Court, there was a personal jurisdiction over the parties which enabled the Court to entertain the suits. The Court said (*e*) : " The first question is whether the plaintiffs, independently of mofussil law, have established a right to redeem. Upon the facts, both the securities of the defendants are anterior to the only security on which the plaintiffs can rely ; they are so both by registration and by reason of the plaintiffs' previous securities being all merged in the last. The plaintiffs can only redeem on the footing of their last security, and on redeeming both the mortgages on which the defendants claim, and on which they have obtained decrees against the mortgagor. The next question is as to the nature of the last of the plaintiffs' securities. It is a security which clearly, according to the law of this Court, is a pledge of the land, and entitles the pledgee to come not as on a mere money demand, but against the land, to get an account, and to claim a foreclosure or sale, on default of payment of the mortgage debt. It is that sort of pledge which entitles the pledgee to redeem a prior pledge in order to give effect to his own security, supposing mofussil law not to be different from ours, or not to be applicable. But it has been

(*c*) *Bholanath Coondoo Chowdry*

(*d*) See *post* p. 262.

v. Unodapersad Roy, 1 Boulnois, 97.

(*e*) 1 Boulnois, 100.

See S. D. A. 1858, p. 657.

contended that we ought to apply mofussil law, and that according to that law no interest at all passes to the subsequent mortgagee, or at least that he has no *locus standi* to re-open a foreclosure. The law that is invoked, does not appear to us to be like a *real* law, but rather to be part either of the law of contract or of legal procedure. That there may be rights acquired in land by a pledge or mortgage of it, is common to both laws. The defendants have taken, on land in the mofussil, a mortgage in the English form : the inference is therefore strong that they intended to contract with reference to English law, and to enforce their rights according to that law. And not only is the mortgage in the English form, but the deed contains a jurisdiction clause. Then all the argument that the *bye-bil-wufa* or mortgage by conditional sale, according to mofussil law, gives no remedies against the mortgagor personally, but only against the land, falls to the ground when we consider that the law of this Court, and the terms of the defendants' mortgage deed, give the mortgagees a right against both the land and the person. The defendants have contracted not only for such a security as a *bye-bil-wufa* affords, but for all the rights given by an English mortgage. Upon this it is said that the mofussil Courts have treated English mortgages in the same way as *bye-bil-wufas*. If this be the case, the Courts may possibly be right to some extent, for though an English mortgage deed is a money bond, it is also a security of another kind, and is a sort of deed of conditional sale : and so far the mofussil Courts may legitimately have considered Regulation XVII of 1806 to apply to it. It has also been argued, that the mofussil Courts consider a decree of foreclosure of this Court as entitled to the same effect as a decree of foreclosure in a mofussil Court under the Regulations. They are right in this also, with one limitation—that is to say, if they take the decree of foreclosure of the Supreme Court to be binding on all parties to the suit in which the decree was made, and if they have not given the decree a



wider operation than this Court does. A decree of foreclosure has been obtained in this Court by the defendants, who, instead of following the ordinary procedure of the Court, omitted to make the plaintiffs parties to the suit. We cannot help the operation of this. When it is questioned before us, we must regard the decree of foreclosure wholly independently of what has been decreed in the mofussil Courts. The question has been raised whether we could contravene any mofussil law or refuse to apply any *lex loci*. But do we contravene any such law? It cannot be said that there is any substantive law on the subject. There is no law which says the mortgagor may not deal with the interest that remains in him. It is indeed admitted that he may sell his interest out and out to a purchaser, and that such purchaser stands in his shoes: this being the case, how can it be said that he shall not conditionally dispose of his interest, when there is no law that forbids his doing so? There is nothing that makes a second mortgage a prohibited security; and if the principle of assignment is once recognized, it is illogical not to recognize a conditional assignment also. Assuming the law to be exactly what it has been argued to be, it only shews that, according to the law of the mofussil under Regulation XVII of 1806, a mortgagee can make his interest absolute against subsequent incumbrancers without going through certain forms against them which in this Court are essential: and this is a simple matter of procedure. It is treating this contract in the same way as a Court of law treats the assignment of a *chose in action*. The Regulation may have been framed in contemplation only of the agreement between the parties to the contract, or it may have been framed on the balance of convenience, and it may therefore have been laid down by the Courts that when the mortgagor retained any interest, he alone should receive notice, and that it should be left to the honesty of that person to give notice to other incumbrancers. But this does not alter the substantive law: it only makes the incumbrancers less

secure, and constitutes no *lex loci rei sitæ* such as we are bound to adopt. This Court is to administer Hindu law when the parties are Hindus; and if the law as to mortgages among the Hindus were *res integra*, it might be said that we went far in importing the equitable doctrines of the English law into the question: but now that law is established. In 1806 the Legislature of this country applied the general equitable law of foreclosure to these mortgage agreements; but it gave a foreclosure somewhat different from that of our Courts. It cannot be said that because the parties to this cause happen to be residing in the mofussil, this Court is to depart from its general rules. It has been argued that the plaintiffs have already obtained in the mofussil Court, all that by the mofussil law they could get, and all that they expected to get when they entered into the contract, and that they ought not to be allowed to put themselves, by coming into this Court, in a better position than if the defendants had brought their foreclosure suit in the mofussil instead of here. But the defendants chose to come here and take a decree for foreclosure. Their position would, no doubt have been different under a mofussil decree: but the defendants having chosen to come here, the plaintiffs (having a right to redeem) say 'we were not made parties, the right of redemption is still subsisting—give effect to it.' Possibly if the defendants had adopted some other mode of proceeding, they might have had other rights than those they now possess, but this consideration cannot control the rules of this Court. There is in reality no hardship on the defendants, for this is no mine sprung upon them after foreclosure. The defendants might have taken a decree in a mofussil Court if they had pleased: but they did not do so, though they knew of the existence of the plaintiffs' claims. Possibly the plaintiffs may be blamed for having slept on their rights for so long: but what can be said for the defendants not having made the plaintiffs parties to their foreclosure suit, except that they chose to rest on their view that mofussil law was applicable to the



case? They chose to do what the Court considers wrong; their opinion was a speculation which the Court does not support. There must be a decree for redemption."

In another case (*f*) the mortgagee, taking advantage of the mortgagor's being personally subject to the jurisdiction of the Supreme Court (which gave that Court jurisdiction even although the land, the subject of suit, was situate in the mofussil), brought an action of ~~ejectment~~ against the mortgagor, to recover possession of land in the mofussil. He claimed under a mortgage by way of conditional sale. On the 11th of August 1858, which was after the date on which the mortgage debt was by the terms of the contract repayable, the defendant, the mortgagor, deposited the amount of the debt in the District Court: and on the 17th of September notice of this deposit was given to the mortgagee. The plaint was filed on the 13th of August 1858. A verdict was given for the defendant, but on an application for a new trial subsequently made, it was contended that a verdict ought to be entered for the mortgagee on the ground that, notwithstanding the Regulations I of 1798 and XVII of 1806, he was entitled to bring an action of ejectment in the Supreme Court. For the mortgagor it was argued that the deposit of the mortgage money in the mofussil Court by him, was a sufficient redemption of the mortgage under the provisions of Regulations I of 1798 and XVII of 1806; and further that if it was not, the plaintiff, the mortgagee, was bound to proceed in the mofussil Court to obtain a foreclosure. The Court (*g*) held that the deposit of the mortgage money by the mortgagor in the District Court, after the mortgage had become absolute, but before the institution of the proceedings in the mofussil for foreclosure, was not within the Regulation, and was therefore ineffectual to redeem the mortgaged property. Upon the second question,—whether the plaintiff had any right

(*f*) *Doe d. Chutto Sheik Jemadar v. Subbassur Sein*, 2 Boulnois, 151. (*g*) Sir C. Jackson and Sir M. Wells, J. J.

to bring an action of ejectment in the Supreme Court without having proceeded to foreclose in the Court within the jurisdiction of which the property was situate,—it was held that although the accident of the defendant being an inhabitant of Calcutta gave jurisdiction, still the Court was bound to administer the *lex loci rei sitæ*: that Regulation XVII of 1806 established a form for foreclosure and was a measure framed for the protection of the mortgagor, conferring on him positive rights which he had not before, with reference to which the mortgagee must be supposed to have contracted and which it would be unjust to take away from the mortgagor: and that therefore the mortgagee could not get possession without first proceeding to foreclose in the mofussil Court, so as to give the mortgagor the opportunity of redeeming within the year of grace, which he was entitled to do under the Regulation.

But cases such as these last referred to cannot occur now, under the restricted jurisdiction which the High Court as a Court of original jurisdiction exercises in suits relating to land. Such suits are not cognisable in the High Court merely by reason of the defendant being personally subject to the jurisdiction. By section 12 of the Letters Patent, the Court in the exercise of its ordinary original civil jurisdiction can entertain “suits for land or other immoveable property” only if such land or property shall be situated, either wholly or in part, within the local limits of the ordinary original jurisdiction of the High Court. If the lands lie only partly within the local limits of the High Court’s jurisdiction, the leave of the Court must be obtained before the suit is instituted (*h*).

The term “in part” in section 12 of the Letters Patent has been construed as not limited to part of the same block or parcel of land, but as (in a wider sense) comprising a part of lands consisting possibly of many blocks or parcels but held under the same title. Thus where there was a mort-



gage—or rather several mortgages, all of them together forming one connected transaction—in the English form, of lands in the mofussil and also of land in Calcutta, leave was given to sue on the original side of the High Court for an account and foreclosure : and it was held that the Court in the exercise of its ordinary original civil jurisdiction had power to make a decree embracing the whole property.

This was in the case of the *Bank of Hindustan v. Nundololl Sen (i)*. The facts were very complicated. The mortgagee had already foreclosed mortgages which he had of some of the mofussil properties : and as regards other lands, they had been actually sold under a money-decree which the mortgagee had obtained. The mortgagee, to whom a large sum remained due, then filed his suit in the High Court on its original side, praying generally for an adjustment of the account and for foreclosure as regards the properties not already dealt with. In delivering judgment the Court said (*j*) : “Leave to sue in this Court was obtained when the plaint was filed, and therefore under the peculiar state of facts shown by the plaint, the suit will lie, though some of the properties which are the subject of it are situated in the mofussil. But the suit being here, it is impossible that, in foreclosing the mortgages of the lands which lie out of Calcutta, I should follow the procedure prescribed by the Regulations for the foreclosure of mofussil mortgages. This Court has no means of carrying out a foreclosure under that procedure. At the same time, on the principles indicated in the case of *Doe d. Chutto Sheikh Jemadar v. Subbessur Sen (k)*, I ought to see that the defendant is not by reason of the suit being brought in this Court deprived of any substantial advantage which he would have had if the suit had been instituted in a Court in the mofussil. For example, as the defendant, if sued in the mofussil, would have had what is called his year of grace within which he might redeem, so

(i) 11 B. L. R. 301.

prel. *ib.* p. 311.

(j) *Id.* p. 308 :—affirmed in ap-

(k) 2 Boulnois, 151.



here he should have a full corresponding year allowed him before making the foreclosure absolute. The parties having contracted in the English form, there is no hardship or injustice to the defendant in dealing with the case in the manner in which I propose to treat it. It is true that to a certain extent, mortgages of lands in the mofussil, drawn up in the English language and in the form of an ordinary English mortgage, have been treated as common *bye-bil-wufas*, or conditional sales. But that has been merely with reference to the one question of the procedure to be gone through in order to obtain foreclosure. In an ordinary Bengali *bye-bil-wufa* it appears on the face of the document itself that the parties intend that, if the mortgagor does not pay the money due, the conditional sale shall become absolute, and the property shall remain finally with the mortgagee in lieu of the debt. Where such intention is apparent, the mofussil Courts have held, and with good reason, that the creditor must look to the land only, and has no remedy against the other property or the person of the mortgagor. But the intention and contract are wholly different in a mortgage in the common English form, where personal and general liability is always contracted for, in addition to the security afforded by the mortgage of the land. It seems to me there is nothing in the argument that, because some of the earlier mortgages have been foreclosed by reason of the non-payment of this same debt, therefore the debt is now to be deemed to be satisfied. Whether it is so or not, according to English law, in an ordinary and simple case where there is but one debt and one security, to apply such a rule, in an exceptional case like the present, would be wholly inequitable and wrong as being contrary to the express intention of the parties as testified in the several deeds executed by them. The Regulations which lay down the law on the subject of mortgages to be applied in the Courts in the mofussil never contemplated a case like this now before me; and they make no provision for such a case.



No mofussil Court in truth has any machinery with which to deal properly with such a matter as this. The English law does not indicate that the plaintiffs' right to recover their money in one way or other would be barred by the foreclosures which have been already obtained; although no doubt the institution of this suit would re-open the foreclosures, and let the defendant in to redeem. I quite think that, if the defendant now chooses to pay off the debt, the foreclosures should be set aside: and doubtless the plaintiffs will be well pleased to be paid off on such terms."

The course adopted in this case has been followed in several later instances.

Applying the same principle, it may be doubted whether a suit similar in character to that of *Doe d. Chutto Sheik Jemadar* (l) if now instituted with the leave of the Court, part of the land being within the local limits of the original jurisdiction, would be dismissed as that suit was. For supposing a suit in the nature of an action of ejectment were brought by a mortgagee in respect of lands situated partly within the local limits of the original jurisdiction, the Court might deal with it as with the case of the *Bank of Hindustan v. Nundololl Sen*, and give a decree substantially preserving to the mortgagor all the rights of redemption &c., which he would have had in a foreclosure suit instituted in a mofussil Court.

The High Court cannot exercise ordinary original jurisdiction with respect to lands not wholly or in part within its local limits, even though the lands are in the possession of the Court Receiver (m). A suit for foreclosure is a suit for land (n): as also is a suit for redemption (o).

(l) 2 Boulnois, 151. See ante, p. 261. *Homed Hadde*, 1 Ind. Jur. 40. See *Blaquiere v. Ramdhono Dass*,

(m) *Denonath Sreemony v. Hogg*, Bourke, 319 (orig.).

1 Hyde, 141.

(n) *Behee Jawn v. Mirza Ma-Shaw*, 1 Ind. Jur. 319.



Although the Court has no jurisdiction over land or other immoveable property not within the local limits of the jurisdiction, and cannot adjudicate as to the right and title thereto, yet when one who holds such land is *personally* subject to the jurisdiction, the Court can declare whether or not he holds it subject to a trust (*p*).

But this is only where there is no dispute as to the legal title to the land. If the title is contested and has to be determined before any declaration of trust can be made, a suit founded on the mere personal jurisdiction over the alleged trustee will not lie. This was decided in the case of the *Delhi and London Bank v. Wordie* (*q*). There the plaintiff stated that lands in the mofussil had been conveyed by A and B to C and D, in trust to sell and divide the proceeds rateably among the creditors of A and B. The plaintiffs were creditors and prayed for a decree declaring the trust in C and D (who were personally subject to the jurisdiction) and directing them to sell &c. The answer was that C and D had in fact no good title to the lands, inasmuch as B repudiated the alleged conveyance in his name to C and D. It was held that the suit was neither more nor less than a suit for land, one of the main points which the Court was asked to decide being the title of the alleged trustees C and D to the share of B. In so deciding, the Court said that the case before it was distinguishable from that of *Bagram v. Moses*, which is not overruled.

When a case is removed from a mofussil Court and tried by the High Court in the exercise of its extraordinary original civil jurisdiction, the law to be applied to the case is that which would have been applied to it by any local Court having jurisdiction therein (*r*). Thus when a suit for redemption, instituted in Dacca, was tried by the High Court in the exercise of its extraordinary original jurisdiction, it was decided according to the law which would have

(*p*) *Bagram v. Moses*, 1 Hydr. 284.

(*r*) Letters Patent of 1866, sec. 20.

(*q*) 1 I. L. R. 249.



been applied if it had been tried in the Dacca Court, from which it was removed (*s*).

There was at one time some uncertainty in the Supreme Court as to the relief to which a mortgagee of lands whether within or without the local limits of Calcutta, is entitled on a mortgage not in the English form, but in one of the forms in common use in the mofussil. The uncertainty was as to whether the decree ought to be for sale or for foreclosure. For a considerable period the decree in all cases was for a sale (*t*). But latterly the practice was to follow the intention of the parties, as evidenced by their contract; or if the intention could not be gathered from the terms of the agreement, to allow the plaintiff to make his election.

This rule, and the reasons on which it is founded, are laid down in the following judgment of the Court (*u*). "Three claims were brought before the Court, in each of which the plaintiff sought an order of foreclosure. Two of these were upon Bengali khuts; the third upon an equitable mortgage constituted by deposit of title-deeds and an English memorandum in writing declaring the purpose of the deposit (*v*). The Court took time to consider whether the relief to be granted on these securities in the event of the non-payment of the sums found to be due thereon respectively, should be a sale or foreclosure. It appears that this Court has ordinarily given effect to Bengali securities of this nature by sale. There seems, however, to be no reason why, if the Bengali instrument, as many mortgage khuts or bye-bil-wufas do, actually import a conditional sale, intended to become absolute if the money be not paid by a certain time, this Court should not do what the Courts of

(*s*) *Doncett v. Wise*, 2 Ind. Jur. 291.

(*t*) *Collydoss Gungapadma v. Sibchunder Mullick*, Morton 111.

(*u*) *Ramnarain Bose v. Ramcunning Paul*, and *Pertaubchunder Paulit v.*

Ashlam Holdar, 24th December 1851.

(*v*) As to an equitable mortgage by deposit of title-deeds, see 11 B. L. R. 405; 7 B. L. R. 55, and *ante*, pp. 53, 54.



the East India Company do in like case, and give effect to the security by a decree of foreclosure. The practice of this Court was, we believe, adopted in supposed conformity with the practice of the Court of Chancery in cases of equitable mortgages. The course of practice in England, however, as to the nature of the relief to be granted on equitable mortgages, has not been uniform. In some of the earlier cases the decree was for foreclosure, with a direction for an absolute conveyance by the mortgagor. There followed a period in which the ordinary decree was for a sale; and in one or two cases the sale was directed to be immediate. In *Parker v. Housefield* (w), however, Lord Cottenham when at the Rolls decided that whether the relief granted was sale, or whether it was foreclosure, the period of six months given for redemption by a decree on a legal mortgage, must be equally given by a decree on an equitable mortgage; and in most of the modern cases (x), the Court has reverted to the earlier form of decree, and directed a foreclosure and absolute conveyance. The form of order to be made on a claim founded on an equitable mortgage, as issued by the Court of Chancery and adopted by this Court, also shows that foreclosure is now considered in general cases the proper mode of relief. There are, however, exceptional cases: and such decisions as *Sampson v. Pattison* (y) and *Lister v. Turner* (z) show, that if the security afford evidence that a sale and not a foreclosure was in the contemplation of the contracting parties, the relief granted will be the former. In the case of *Ramnarrain Bose v. Ramcunny Paul*, we think there is such evidence. The parties have expressly stipulated that in the event of the non-payment of the money the property shall be sold. In this case therefore we think the decree should be for sale. In *Pertaubchunder Paulit v. Ashlam Holdar*

(w) 2 Mylne and Keene, 419.

Webb, 6 Beavan, 552; *Holmes v.*(x) See amongst others *Ball v.**Turner*, 7 Hare, 369.*Harris*, 8 Simons, 485, and 4

(y) 1 Hare, 533.

Mylne and Craig, 264: *Tylee v.*

(z) 5 Hare, 281.



the security says nothing about a sale; it does not clearly define what is to be done in default of payment, but it is termed a khut mortgaging lands, and there seems to us to be no reason why, if the plaintiff prefer it, he should not have the usual order of foreclosure. In the other case, the order may be the usual order of foreclosure on an equitable mortgage by deposit."

Whether the mortgage was by conditional sale or not, the mortgagee could in the Supreme Court recover the money advanced by him, with interest, on default being made by the mortgagor in payment at the appointed time. At first the Court seems to have entertained doubts on this point, and in one or two instances, it was held that when the terms of the contract implied that the mortgagee was to look to the land alone for payment, he could not recover the money debt (*a*). But it has long been established, that an action for money lent will lie on the expiration of the time limited, the mortgage being treated merely as evidence of the original loan (*b*).

Where the plaintiff after having obtained a decree in the Supreme Court, was obliged to have recourse to a mofussil Court in order to have it carried out, the latter was bound to accept and to respect the subsisting decree; the question which had been decided could be re-opened only in the Court which decided it (*c*).

But decrees of the Supreme Court could not be enforced in the mofussil Courts against any person, except the parties to the original suit, or their representatives. Therefore when the mortgagee sued the mortgagor alone in the Supreme Court, and got a decree for foreclosure, and afterwards brought a suit for possession, founded on this decree,

(*a*) *Radachurn Seat v. Panchanund Sealmonney, and Ruggonauth Shaw v. Ramdun Deb Surmono*, Morton 233, 234. (*b*) *Tilluckram Puckrassy v. Choitmachurn Naut, and Sopteram Day v. Panchanund Mitter*, Morton 230, 232, and 233 note (*b*).
(*c*) S. D. A. 1847, p. 354: 1853, p. 859: 1850, p. 458: 1856, p. 323.



against a third party whom he found in occupation of the lands, that party having purchased the mortgagor's rights before the institution of the suit in the Supreme Court, it was held that, as the defendant had not been a party to the original suit, the decree formed no ground for a claim against him in the mofussil Court (*d*).

A decree by the Supreme Court for sale of mortgaged lands situate in the mofussil, had no effect whatever *in rem*. It was in substance merely a decree that the parties in the suit should concur in conveying the property to a purchaser. And such a decree for sale had no operation on the title of persons in the mofussil who were not parties to the suit (*e*).

The mortgagor's equity of redemption may be attached and sold on the application of a judgment-creditor. But it ought never to be so at the suit of the mortgagee who has obtained a mere money-decree, except under such circumstances as make the sale clearly beneficial to the mortgagor. And the Calcutta High Court holds that if the mortgagee having got a money decree attaches and sells his mortgagor's right title and interest, the purchaser will get the benefit of the mortgagee's lien. The purchaser takes the whole interest both of the mortgagor and of the mortgagee, and the latter has no longer any lien on the property. He cannot first sell the mortgagor's equity of redemption, and then proceed afterwards to enforce his mortgage as against the purchaser of that equity of redemption, in order to realise the balance remaining due to him (*f*).

A mortgagee having obtained a decree of foreclosure in the Supreme Court, sued on it in the mofussil for possess-

(*d*) S. D. A. 1853, p. 210. See S. D. A. 1853, p. 859 : 1850, p. 45, and 8 N. W. P. 316 : see also *Bholanath Coondoo Chowdry's case*, 1 Boulnois, 97, and *ante*, pp. 256—261.

(*e*) *Anundomoyo Dossee v. Dhondro Chunder Mookerjee*, 14 Moore, 101 (109), 8 B. L. R. 122.

(*f*) See *ante*, pp. 201—205. See also 10 B. L. R. 57 : 5 B. L. R. 380, 450 : 4 B. L. R. a. j. 83.



ion, bringing his suit against the person whom he found in occupation. The defendant pleaded that he had bought the land from the mortgagor, subsequent to the date of the plaintiff's mortgage, but more than twelve years before the institution of the foreclosure suit. The Court ruled that the suit was barred by lapse of time, the defendant having been more than twelve years in undisturbed possession (*g*).

Act XIV of 1859 declared (*h*) the period of limitation in suits for the recovery of immoveable property or of any interest in immoveable property to be twelve years from the time the cause of action arose. But it further (*i*) provided that "in suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt." The effect of these clauses when read together was to give a mortgagee suing his mortgagor in the late Supreme Court or in the High Court on its original side, for possession of immoveable mortgaged property,—twelve years from the latest payment on account of the mortgage debt, within which to bring his suit.

Discussing these provisions in a case in which the right under the mortgage deed was to obtain possession of the land when default was made, and the cause of action accrued then,—the Privy Council remark (with reference to the exception as to suits in Courts established by Royal Charter) that where there is an express exception so limited to one special case of mortgage, it might plausibly be argued that it cannot be extended to any other case, not even to that of the original mortgagor himself continuing in possession and paying interest to the mortgagee. Their Lordships however (without deciding the point)

(*g*) S. D. A. 1853, p. 210. So and S. D. A. 1853, p. 546.
Brজননাথ কুন্দু চৌদ্রী's case, (*h*) Sec. 1, cl. 12.
14 Moore, 141, 8 B. L. R. 104 : (*i*) Sec. 6.



continue, "It may, however, have been deemed necessary to introduce the exception stated above, in order to put mortgages in the English form, when put in suit in the Supreme Court which was generally governed by English law, upon the same footing as that in which English mortgages are under the existing statutes of limitation: and their Lordships dealing with suits upon mortgages in the native Courts of India, might in the simple case of a mortgagee and his mortgagor being permitted to remain in possession so long as he paid interest, have found ground for considering that there was a permissive possession and that a new cause of action and right of entry accrued when that permission ceased" (j).

When the same person is to pay and receive money, a Court of Equity presumes that the money is paid. Therefore when there is an incumbrance upon land and any person is entitled to both the land and the incumbrance, without having an absolute interest in both, and the one not being merged in the other, limitation would not run during his possession of land and incumbrance, as he would be deemed to have paid himself interest. And this would be so even if he were not in possession of the entire land subject to the incumbrance,—which would be kept alive against the whole by payment of interest for part (k).

By the later Limitation Act IX of 1871 (l) twelve years, beginning to run when the mortgagee is first entitled to possession, is still the period of limitation in suits instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged. But in a similar suit before a Court established by Royal Charter, *i. e.* a High Court in the exercise of its ordinary original civil jurisdiction, the period of limitation is sixty years,—and the years begin to run when any part of the principal or interest was last paid on account of the

(j) *Brannonath Koondoo Chowdhry's* Equity Rep. 561 and 12 *do.* 585.
case, 11 Moore, 144 (150).

(l) Sch. 2, art. 135.

(k) *Kirkwood v. Lloyd*, 11 Irish



mortgage debt. Where mortgaged land lies in the mofussil, and the High Court can entertain a suit relating to it because some part of the property comprised in the mortgage is situate within the local limits of the High Court's ordinary original civil jurisdiction, it will be a doubtful question whether the mortgagee will not get the benefit of the sixty years' rule, even as regards the land in the mofussil.

But a new law for the limitation of suits is now before the Legislature, and will soon take the place of the present Act. Many changes will doubtless be made : and to these careful attention will be necessary.

APPENDIX.

I.—PURE USUFRUCTUARY MORTGAGE. (a)

I WRITE this instrument of mortgage of talook Barnagore, in pergunnah Meerbhoom, in the District of Nuddeah, the net annual profit of which, after deducting the sum of Rs. 400 for the Government revenue, is Rs. 500. In consideration of my mortgaging to you the aforesaid talook, I borrow from you the sum of Rs. 1,200, re-payable with interest at the rate of 12 per cent. per annum. I will immediately put you in possession of the said talook, and you will collect the rents &c. thereof: after paying the Government revenue from the said collections, you will apply the remainder to the payment of interest that will accrue due to you on the said sum, and in case there shall be any surplus after such payment of interest as aforesaid, such surplus shall be taken by you in part payment of the principal. You will so remain in possession of the aforesaid talook till the whole amount of the loan, together with interest at the rate aforesaid, is liquidated. Dated, &c.

II.—SIMPLE MORTGAGE.

I WRITE this instrument of mortgage of land situated in Aheeritola Street, in Shootanooty, which I purchased in the year 1820, that is to say, 17 beegahs, 5 chittaks of land, bounded on the North by the house of Sibcunder Ghose, on the South by a garden belonging to Ramlohl Sen, on the East by the house of Rammohun Dass, and on the West by the house of Sreekishen Bose. In consideration of my mortgaging to you the aforesaid land, I borrow from you the sum of Rs. 1,600, which is to be repaid on the 16th March 1880 with interest at the rate of 12 per cent. per annum. In default of

(a) The first three precedents are nearly literal translations [except as to dates] of mortgage bonds on which advances were actually made, and which were put in suit many years ago. Such documents if prepared now must contain the details required by the Registration Act, &c., See *ante*, p. 82 *et seq.*



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my paying the abovementioned sum with interest, within the limited time, you will cause the aforesaid land to be sold and pay yourself by the proceeds thereof. I deposit with you the title deeds of the land, which shall be returned to me on the re-payment of the loan with interest. Dated &c.

III.—MORTGAGE BY CONDITIONAL SALE, KUT-KUBALA, OR BYE-BIL-WUFA.

I WRITE this instrument of mortgage of 6 beegahs, 2 chittaks of ancestral rent-free land, in mouzah Borocota, in the District of Hooghly, which has for a long time been my property. The said land is bounded on the North by the house of Sibchunder Ghose; on the South by the house of Shamechunder Mullick; on the West by a pond belonging to Madhubchunder Paul; on the East by a piece of land belonging to Mahadeb Sircar. In consideration of my mortgaging the aforesaid land to you, I borrow from you the sum of Rs. 175, which is to be re-paid at the end of one year from this date, with interest at the rate of 12 per cent. per annum. In default of my paying the above-mentioned sum with interest, within the limited time, I agree to relinquish my interest in the aforesaid land and to put you in possession thereof as rightful owner and proprietor. I deposit with you the title deeds of the aforesaid land which shall be returned to me on the re-payment of the loan with interest. Dated, &c.

IV.—ENGLISH MORTGAGE IN FEE, WITH POWER OF SALE.

THIS indenture, made the day of between A. B., of &c. (mortgagor) of the one part, and C. D., of &c., (mortgagee) of the other part, Witnesseth, that, in consideration of the sum of £ this day paid to the said A. B., by the said C. D., (the receipt whereof the said A. B., doth hereby acknowledge,) he, the said A. B., doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors, and administrators, that the said A. B., his heirs, executors, or administrators, will pay to the said C.



D., his executors, administrators, or assigns, the sum of £ (the principal), with interest for the same in the mean time at the rate of £ per cent. per annum on the day of next (b), without any deduction. And This Indenture (c) also Witnesseth that, for the consideration aforesaid, the said A. B. doth hereby grant and release unto the said C. D., his heirs, and assigns, all those lands, tenements, messuages and hereditaments, situate in the Parish of , in the county of , delineated in the plan in the margin of these presents and specified in the Schedule hereunder written, (d) together with all commons, ways, lights, waters, water-courses, rights, privileges, easements, advantages and appurtenances whatsoever to the said hereditaments or any part thereof appertaining, or with the same or any part thereof held, used, or enjoyed, or reputed as part thereof, or appurtenant thereto: and all the estate and interest of the said A. B. in the said premises: To hold the said premises unto and to the use of the said C. D., his heirs and assigns. Provided always, that, if the said A. B., his heirs, executors, administrators, or assigns, shall pay unto the said C. D., his executors, administrators or assigns, the said sum of £ (the principal), together with interest for the same in the meantime at the rate of £ per cent. per annum, on the said day of next without any deduction, then the said C. D., his heirs, or assigns, will, at any time thereafter, upon the request and at the cost of the said A. B., his heirs, executors, administrators, or assigns, re-convey the said premises unto the said A. B., his heirs and assigns, or as he or they shall direct, free from incumbrances by the said C. D., his heirs, executors, or assigns. And it is hereby declared that the said C. D., his executors, administrators, or assigns, may at any time or times after the said day of next (e) without any further consent on the part of the said A. B., his heirs, or assigns, sell the said premises, or any part thereof, either together or in parcels, and either by public auction or private contract, and may buy in or rescind any contract for sale, and re-sell, without being responsible for loss occasioned thereby; and may execute and do all such assurances and acts for effectuating any such sale as the said C. D., his executors, administrators, or assigns, shall think fit; And that upon a sale by any

(b) Generally six Calendar months from the date of the mortgage.

(c) When the property mortgaged is situated in India, the words "which is executed in pursuance of, and intended to take effect under Act IX of 1842 of the Legislative Council of India," must be here inserted.

(d) See the Registration Act, 1877, and *ante*, pp. 82 *et seq.*

(e) The day for payment of the principal sum.

person or persons who may not be seized of the legal estate, the person in whom the legal estate shall be vested shall execute and do all such assurances and acts for carrying the sale into effect, as the person or persons by whom the sale shall be made shall direct: Provided nevertheless, that the said C. D., his executors, administrators, or assigns, shall not execute the power of sale hereinbefore contained, until he or they shall have given to the said A. B., his heirs, executors, administrators, or assigns, or left on the said premises, a notice in writing to pay off the monies for the time being owing on the security of these presents, and default shall have been made in such payment for six calendar months after giving or leaving such notice: Provided also, that, upon any sale purporting to be made in pursuance of the aforesaid power, no purchaser shall be bound to inquire whether the case mentioned in the clause lastly hereinbefore contained has happened, nor whether any money remains upon the security of these presents, nor as to the propriety or regularity of such sale; and notwithstanding any inpropriety or irregularity whatsoever in any such sale, the same shall, as regards the purchaser or purchasers, be deemed to be within the aforesaid power, and be valid accordingly. And it is hereby declared that the receipt of the said C. D., his executors, administrators, or assigns, for the purchase monies of the premises sold, or any part thereof, shall effectually discharge the purchaser or purchasers therefrom and from being concerned to see to the application thereof, or being accountable for the non-application or mis-application thereof; And that the said C. D., his executors, administrators, and assigns, shall, out of the monies arising from any sale in pursuance of the aforesaid power, in the first place, pay the expenses incurred on such sale, or otherwise in relation to the premises; and, in the next place, apply such monies in or towards satisfaction of the monies for the time being due on the security of these presents; and then pay the surplus (if any) of the monies arising from such sale to the said A. B., his heirs, or assigns; And that the aforesaid power of sale and other powers may be exercised by any person or persons for the time being entitled to receive and give a discharge for the monies then owing on the security of these presents; Provided always, that the said C. D., his executors, administrators, or assigns shall not be answerable for any involuntary losses which may happen in the exercise of the aforesaid power and trusts, or any of them. And the said A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., his heirs and assigns, that the said A. B., now hath power to grant and release all and singular the said premises unto and to the use of the said C. D., his heirs and assigns, in manner aforesaid, and free from incumbrances; And that he the said A. B., and his heirs, and every other



person lawfully or equitably claiming any estate or interest in the premises, will at all times, at the request of the said C. D., his heirs, executors, administrators, or assigns, but at the cost of the said A. B., his heirs, executors, or administrators, execute and do all such assurances and acts, for further or better assuring all or any of the said premises to the use of the said C. D., his heirs and assigns in manner aforesaid, as by him or them shall be reasonably required. In witness whereof the said A. B. and C. D. have hereunto set their hands and seals the day and year first above written.

The Schedule to which the above written Indenture refers.

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